

11th Circuit
Supreme Court
TRANSCRIPT OF RECORD

Lucy S. Belmont
Supreme Court of the United States

OCTOBER TERM, 1927

No. 65

RAY C. SIMMONS, PETITIONER,

vs.

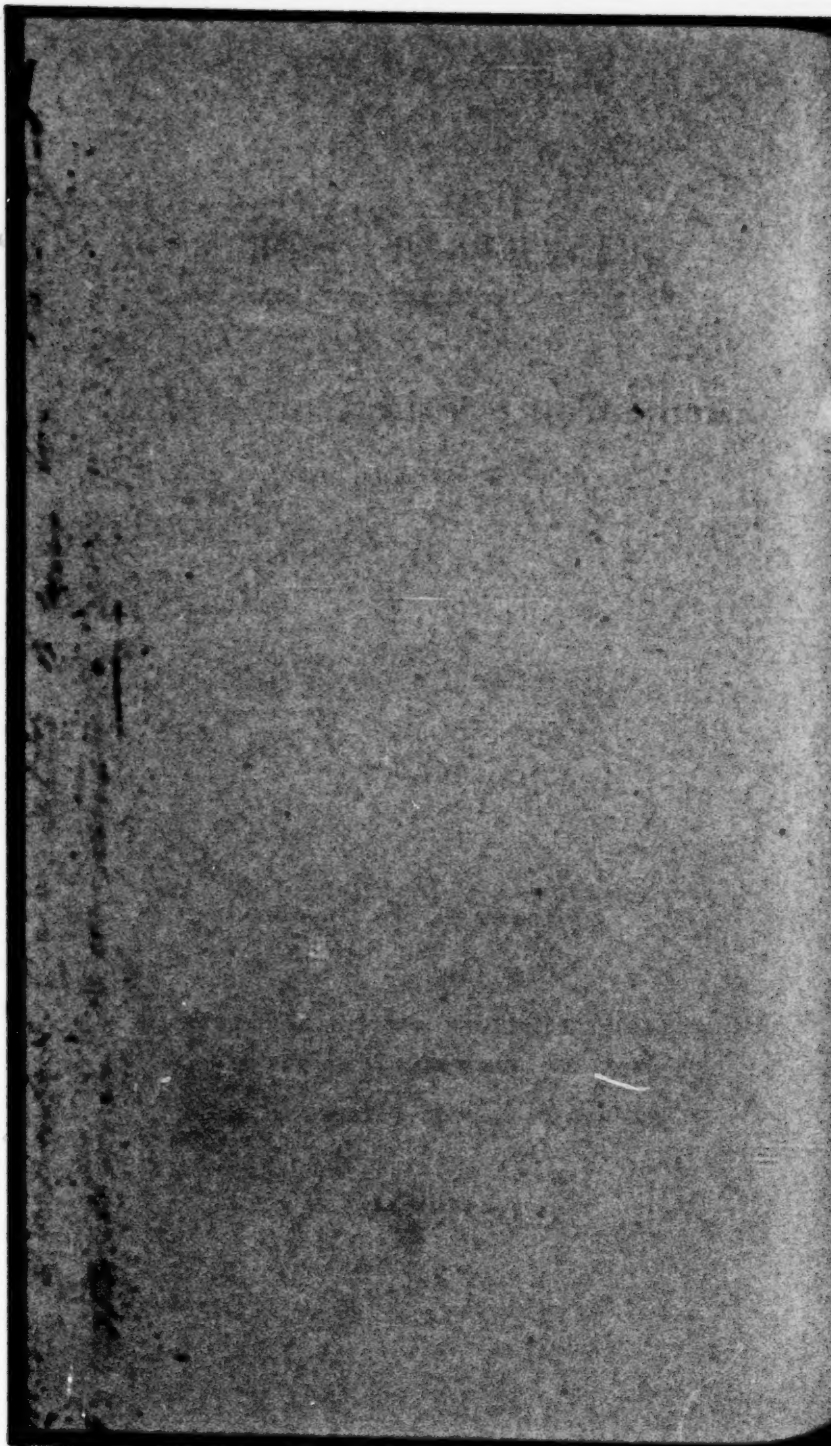
EDWARD P. SWAN

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT**

WRITING FOR CERTIFICATE FILED MAY 11, 1928

CERTIFICATE GRANTED OCTOBER 11, 1928

(51,935)



(31,938)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 377

RAY C. SIMMONS, PETITIONER,

VS.

EDWARD P. SWAN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT

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**IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT, OCTOBER TERM, 1924**

No. 1869

RAY C. SIMMONS, Plaintiff, Plaintiff in Error,

v.

EDWARD P. SWAN, Defendant, Defendant in Error

WRIT OF ERROR AND RETURN

UNITED STATES OF AMERICA, ss:

[L. S.] The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between Ray C. Simmons, of the town of East Hartford, in the County of Hartford and State of Connecticut, plaintiff, and Edward P. Swan, of South Deerfield, in the County of Franklin, in the Commonwealth of Massachusetts, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, together with this writ, so that you have the same at the city of Boston, Massachusetts, on the twenty-third [fol. 2] day of May next, in the said Circuit Court of Appeals, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-third day of April, in the year of our Lord one thousand nine hundred and twenty-five.

James S. Allen, Clerk of the District Court of the United States, District of Massachusetts.

Allowed by Elisha H. Brewster, U. S. District Judge.

Return of District Court on Writ of Error

DISTRICT COURT OF THE UNITED STATES,

District of Massachusetts, ss:

And now, here, the judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In testimony whereof, I, James S. Allen, clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said court this twenty-third day of June, A. D. 1925.

James S. Allen, Clerk. (Seal.)

[fol. 3] IN UNITED STATES DISTRICT COURT, DISTRICT
OF MASSACHUSETTS

No. 2208, Law Docket

RAY C. SIMMONS, Plaintiff,

v.

EDWARD P. SWAN, Defendant

WRIT OF ATTACHMENT AND MARSHAL'S RETURN

MASSACHUSETTS DISTRICT, ss:

The President of the United States of America to
[L. &.] the Marshal of our District of Massachusetts or
his deputy, Greeting:

We command you to attach the goods or estate of Edward P. Swan of South Deerfield in the County of Franklin in

the Commonwealth of Massachusetts, in our District of Massachusetts, to the value of thirty thousand (30,000) dollars, and for want thereof to take the body of the said Edward P. Swan (if he may be found in your district), and him safely keep, so that you have him before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the first Tuesday of December: Then and there, in our said Court, to answer unto Ray C. Simmons of the town of East Hartford in the County of Hartford and State of Connecticut, in an action of contract to the damage of the said Ray C. Simmons (as he says) the sum of thirty thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness the Honorable James M. Morton, Jr., at Boston, the twelfth day of November in the year of our Lord one thousand nine hundred and twenty-three.

James S. Allen, Clerk.

[fol. 4]

Officer's Return on Writ

UNITED STATES OF AMERICA,

Massachusetts District, ss:

Springfield, November 13, A. D. 1923.

Pursuant hereunto I have this day at 11 o'clock and 15 minutes, a. m., attached as the property of the within named Edward P. Swan, defendant, all his right, title and interest in and to any real estate in South Deerfield or elsewhere in the County of Franklin, and on the following day deposited an attested copy of this writ, within the declaration and of so much of my return as relates to the attachment of real estate, in the office of the Register of Deeds for said County of Franklin, and afterwards on the fourteenth day of said November, A. D. 1923, gave in hand to said defendant an original summons to this writ for his appearance at court as within directed.

William J. Keville, U. S. Marshal, by Edward J. Leyden, Deputy.

Service, \$4; express, \$3.43; Registry of Deeds, 50 cents; \$7.93.

The writ in this cause was duly entered at the December Term of this court, A. D. 1923, when and where the parties appeared by their respective attorneys.

IN UNITED STATES DISTRICT COURT

DECLARATION—Filed December 5, 1923

In the above entitled action of contract for cause of action the plaintiff declares and says:

1. The plaintiff, who is a citizen of the State of Connecticut, and the defendant, who is a citizen of the State of Massachusetts, on the thirteenth day of September, 1923, entered into a written contract with each other, of which contract a copy is hereto attached and marked "Exhibit A" and made a part of this paragraph.

2. At the time specified in said contract the plaintiff was ready, able and willing to perform all acts and things required of him to be done and performed by the terms of said contract, and offered to the defendant so to do and demanded of the defendant that he perform and do the things required of him by the terms of said contract.

3. The defendant neglected and refused to perform and do the things required of him by said contract.

4. By reason of said refusal on the part of the defendant to perform said contract, the plaintiff has been greatly injured.

The plaintiff claims twenty five thousand (25,000) dollars damages.

Plaintiff, by Percy S. Bryant, His Attorney. Percy S. Bryant, 847 Main Street, Hartford, Conn., Attorney for the Plaintiff.

EXHIBIT A TO DECLARATION

Memorandum of Agreement

Made this thirteenth day of September, A. D. 1923, by and between Edward P. Swan of South Deerfield, in the County of Franklin and Commonwealth of Massachusetts, doing business as E. P. Swan Company, Party of the First Part, and Ray C. Simmons of Silver Lane, in the State of Connecticut, Party of the Second Part,

Witnesseth: The Party of the First Part does hereby agree to and with the Party of the Second Part to sell to said Party of the Second Part all that land situate on the south side of South Mill River Road in South Deerfield, so-called, containing two (2) acres, more or less, on which is situate the pickle factory, sheds and four tenement building of the Party of the First Part, together with one Reo Truck, one Ford Truck, all vinegar, cooperage, (except sixty-five (65) one-headed barrels now on said premises) and equipment of every name, nature and description, now on said premises and used by the Party of the First Part in connection with the operation of the pickle business of said Party of the First Part; and together with the good-will of said Pickle business.

[fol. 6] The Party of the Second Part agrees to and with the Party of the First Part that for and in consideration of said purchase he will pay to the Party of the First Part the sum of Fifteen Thousand (\$15,000) Dollars, as follows, viz: Five Hundred (\$500) Dollars to be paid on the signing of this agreement, and check for which is hereby acknowledged; Twenty five Hundred (\$2,500) Dollars to be paid on or before October 1st, 1923, the balance of said purchase price, namely Twelve Thousand (\$12,000) Dollars shall be paid by the note of the Party of the Second Part to the order of the Party of the First Part carrying interest at six per cent. (6%), semi-annually, and payable on demand.

The Party of the Second Part further agrees to and with the Party of the First Part to execute, acknowledge, and deliver to the Party of the First Part as security for said note, suitable mortgages, in standard form, covering the property conveyed.

The Party of the First Part further promises and agrees to and with the Party of the Second Part to sell to said Party of the Second Part all of the pickles now in tanks on said premises and the Party of the Second Part promises and agrees to pay therefor the sum of Four (4) Dollars per thousand, according to the receipt book (cucumbers received) of the Party of the First Part as of October 1st, 1923, which payment is to be made by note of the Party of the Second Part to the Order of the Party of the First Part for the full amount due therefor, on demand and carrying interest at six per cent (6%) per annum, and carrying the signatures thereon of F. C. Gould and Thomas J. Molumphy, both of said Silver Lane, as joint makers.

It is mutually agreed that the taxes on said property are to be apportioned by the parties hereto as the date of delivery of the deed.

The time set for the performance of this agreement is on or before October 1st, 1923 and the place the office of Davenport & Fairhurst, Greenfield, Mass.

Tender of performance on the part of the Party of the First Part shall be sufficient if on said date a deed and bill of sale, in accordance with the provisions hereof, is left with [fol. 7] said Davenport & Fairhurst for delivery to the Party of the Second Part; and Tender of performance shall be sufficient on the part of the Second Part if on said date the sum of Twenty-five Hundred (2,500) Dollars, plus suitable notes and mortgages, are left with said Davenport and Fairhurst for delivery to the Party of the First Part.

In the event that the Party of the Second Part fails to perform any of the promises and agreements herein contained, the amount this day paid shall be retained by the Party of the First Part as liquidated damages for said breach.

Time is of the essence of this contract and said agreement is binding on the executors and administrators of the respective parties hereto.

In witness whereof the parties hereto have hereunto interchangeably set their hands and seals the day and year first above written.

Edward P. Swan. (L. S.) Ray C. Simmons. (L. S.)

In presence of Chas. Fairhurst.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed December 7, 1923

Now comes the defendant in the above-entitled action, not waiving his special appearance heretofore filed, nor his motion to dismiss, nor motion for endorser for costs, but expressly relying thereon, and not admitting, but denying, jurisdiction of this court over him, for answer to the plaintiff's declaration denies each and every material allegation in the plaintiff's writ and declaration contained.

Edward P. Swan, by Davenport & Fairhurst, His Attorneys.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY

This cause was thence continued from term to term to the December Term, A. D. 1924, when, to wit, December 17, [fol. 8] 1924, a jury was duly impanelled and sworn according to law to try the issue, the Honorable Elisha H. Brewster, District Judge, sitting.

IN UNITED STATES DISTRICT COURT

MOTION FOR DIRECTED VERDICT—Filed and Allowed December 18, 1924

The defendant respectfully moves that on all the evidence a verdict be directed for the defendant.

Edward P. Swan, by Davenport & Fairhurst, His Attorneys.

This cause came on to be heard and was fully heard by the court on the seventeenth and eighteenth days of December, A. D. 1924, the Honorable Elisha H. Brewster, District Judge, sitting, and on said eighteenth day of December, the jury, after hearing all matters and things concerning the same, returned the following Verdict by order of the court:

IN UNITED STATES DISTRICT COURT

VERDICT—December 18, 1924

The jury find for the defendant by order of the court.

John C. Robinson, Foreman.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRIES

At the same term, to wit, February 12, 1925, a draft bill of exceptions was filed by the plaintiff within extended time.

On the twentieth day of February, A. D. 1925, a motion to dismiss bill of exceptions and defendant's objections to the plaintiff's bill of exceptions were filed.

This cause was thence continued to the present March Term, A. D. 1925, when, to wit, April 23, 1925, a second motion to dismiss bill of exceptions is filed.

On the said twenty-third day of April, this cause is set down for hearing on the aforementioned motions to dismiss the bill of exceptions and on the objections to the bill of exceptions, the Honorable Elisha H. Brewster, District [fol. 9] Judge, sitting, and it is ordered that the motions to dismiss be denied, and all objections to the plaintiff's bill of exceptions be overruled with the exception of the third objection, which is sustained.

Thereupon, on said twenty third day of April, the aforesaid plaintiff's bill of exceptions is allowed by the court.

And now, to wit, April 23, 1925, it is considered by the court, the Honorable Elisha H. Brewster, District Judge, sitting, that the said Ray C. Simmons, plaintiff, take nothing by his said writ and that the said Edward P. Swan, defendant, recover of the said plaintiff his costs of suit taxed at —.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL OF EXCEPTIONS AND ORDER DENYING
SAME—Filed February 20, 1925

Now comes the defendant in the above entitled action, not waiving his special appearance and objections heretofore entered, but relying thereon and not admitting but denying jurisdiction of this court over him, and respectfully moves that the plaintiff's bill of exceptions be dismissed:

1. For the reasons set forth in the objections hereto annexed and made a part hereof.

2. For that the said defendant, or his attorney of record, were not furnished with a copy of the entire bill of exceptions but with only a portion thereof.

Edward P. Swan, by Davenport & Fairhurst, His Attorneys.

Denied. E. H. B., D. J.

IN UNITED STATES DISTRICT COURT

OBJECTIONS TO BILL OF EXCEPTIONS AND ORDER ON SAME—
Filed February 20, 1925

Now comes the defendant in the above entitled action appearing specially for the purpose of filing objections to the plaintiff's bill of exceptions and not admitting but denying jurisdiction of this court over him and objects to the plaintiff's bill of exceptions and assigns as causes therefor (without waiving other causes not specifically assigned) as follows:

1. That the plaintiff's bill of exceptions does not accurately and truthfully accord with the evidence as appears by reference to the pleadings and the transcript of the evidence in said case.

2. For that said bill of exceptions erroneously states that the plaintiff's action among other things is based on an alleged obstruction and prevention of tender of performance by the defendant.

3. That said bill of exceptions erroneously states that the action involved title to real and personal property.

4. That said bill of exceptions erroneously states that the court ruled that as a part of the tender of performance on the part of the plaintiff a suitable mortgage was not presented in that under the circumstances the signature of the plaintiff's wife was not attached to the real estate mortgage.

5. That the bill of exceptions erroneously states that the plaintiff excepted to the rulings and conclusions of the court as therein specified.

All of which appear more particularly by reference to the transcript of the evidence in said case.

Edward P. Swan, by Davenport & Fairhurst, His Attorneys.

Third objection sustained. Others overruled. Exceptions saved. E. H. B., D. J.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL OF EXCEPTIONS AND ORDER DENYING
SAME—Filed April 23, 1925

The defendant respectfully moves to dismiss the plaintiff's bill of exceptions, for that the same was not filed within the time allowed by the Honorable Court.

By His Attorneys, Davenport & Fairhurst.

Denied. Exceptions saved. E. H. B., D. J.

[fol. 11] IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed February 12, 1925; Allowed
April 23, 1925

STATEMENT OF CASE

This is an action for breach of contract brought by the plaintiff, a resident of East Hartford, Connecticut, against the defendant, a resident of South Deerfield, Massachusetts.

The action was brought in the District court of the United States for the District of Massachusetts, and heard at Springfield in said District on December 17th and 18th, 1924.

The pleadings are hereby referred to and made a part hereof.

The plaintiff seeks to recover twenty-five thousand dollars (\$25,000) damages for refusal and failure by the defendant to carry out the terms of his obligations under the contract (Exhibit A), and by obstructing and preventing the plaintiff from making such tender of performance as was required of the plaintiff by the defendant at the time set for the consummation of the contract, to wit, on or before October 1, 1923, at the office of Davenport & Fairhurst, defendant's attorneys at law, at Greenfield, Massachusetts.

The action involved the fair market value on October 1, 1923, of land situate in South Deerfield, Massachusetts, with a certain pickle factory, sheds and a four-tenement building; together with a Reo truck, a Ford truck, all vinegar, certain cooperage and equipment then on said premises and used by the defendant in connection with the operation of his pickle business; together with the good will of that business. It also involved the fair market value of all pickles then in tanks on the premises of the defendant above referred to. The defendant was to receive for the real estate and equipment the sum of fifteen thousand (15,000) dollars, five hundred (500) dollars of which was paid to the defendant by the plaintiff by the plaintiff's personal check dated and delivered to the defendant by the plaintiff on September 13, 1923, and twenty-five hundred (2,500) dollars was to be paid by the plaintiff to the defendant on or before October 1, 1923. The balance of the purchase price of said real estate and equipment, to wit, twelve thousand (12,000) dollars, was to be paid by a note of the plaintiff to the order of the defendant with interest at six per cent [fol. 12] (6%) payable on demand, which was to have as collateral security suitable mortgage covering the real estate and a mortgage covering the personal property. In addition the plaintiff was to pay to the defendant the sum of four (4) dollars per thousand for all of the pickles (being all cucumber pickles) then in the tanks on the premises at South Deerfield, whose value in money was to be

ascertained after conference between the plaintiff and defendant, and recourse had to the receipt book of the defendant. Payment for the pickles at four (4) dollars per thousand when their number was determined was to be made by note of the plaintiff to the order of the defendant for the full amount due on demand with interest at six per cent (6%), with the names of F. C. Gould and Thomas J. Molumpay, both of East Hartford, Connecticut, associates of the plaintiff in the ownership and operation of a pickle corporation located at said East Hartford, and known as The Silver Lane Pickle Company, Incorporated, appearing on said note.

The trial of this case came on the seventeenth and eighteenth days of December, 1924, before a jury duly impanelled; the Honorable Elisha H. Brewster, presiding; both parties appearing by counsel.

The following is a transcript of all the evidence introduced at the trial:

EVIDENCE FOR PLAINTIFF

Before Judge Elisha H. Brewster and Jury

Wednesday, December 17, 1924—10 A. M.

Appearances: Percy S. Bryant, Esq., and William J. Malone, Esq., for Plaintiff; Davenport & Fairhurst, for Defendant.

[Stenographer sworn.]

[Plaintiff's opening, by Mr. Bryant.]

RAY C. SIMMONS (SWORN).

By Mr. Bryant:

Q. 1. What is your full name?

A. Ray C. Simmons, claimant.

Q. 2. And your age?

A. Thirty eight last February.

[fol. 13] Q. 3. Where do you reside?

A. Silver Lane, East Hartford, Connecticut.

Q. 4. Well, be a little more specific. You reside in what town?

A. In the town of East Hartford.

Q. 5. In the State of Connecticut?

A. In the State of Connecticut.

Q. 6. And in a portion of the town that is known as what?

A. Silver Lane.

Q. 7. And what is your business?

A. Why, I work in the pickle business most of the time; most of my life; the last nineteen years.

Q. 8. The manufacture and sale of—

A. Pickles and farming in general.

Q. 9. What kind of pickles?

A. Well, all kinds of pickles; both bottled and bulk; vinegar and dill; sweet or mustard pickles; all kinds; anything in the line of manufactured pickles; growing and manufactured.

Q. 10. And by what concern are you employed?

A. Silver Lane Pickle Company.

Q. 11. And that is a corporation?

A. It is.

Q. 12. How long have you been in that line of employment?

A. Nineteen years ago last April I started and have been there ever since.

Q. 13. And in what departments, if any particular departments of the business, are you especially engaged?

A. Why, I started at the bottom, and all the way up; all parts. At the present time I have charge of the factory.

Q. 14. Where do you obtain your—or, what is your raw material?

A. Why, anything that leads into the line of pickles like—

Q. 15. It may be possible that we know, but won't you tell us what?

A. Why, vinegar pickles, of course, is the main thing.

Q. 16. Cucumbers?

A. Cucumbers, cauliflower, tomatoes, peppers, sugar, spices of all kinds.

Q. 17. Cabbages?

A. Cabbages and mustard, vinegar and sugar.

Q. 18. Where do you obtain your raw materials chiefly?

A. Why, we grow some of them ourselves. We buy—

[fol. 14] of course, if you buy any large amount, about the only place is Chicago; around in the West.

Q. 19. You buy your materials where?

A. Why, all around. We buy in Massachusetts; we buy in Connecticut, but the majority of the pickles are grown in the West around Chicago. Chicago is the pickle market.

Q. 20. Chicago is the pickle market. What section of the country is center of the cucumber growing trade?

A. Chicago.

Q. 21. And territory around Chicago?

A. Yes.

Q. 22. How large a territory?

A. Why, through the center states; Michigan, Illinois; through there. Michigan, I guess, is the largest state.

Q. 23. How much of an establishment is the Silver Lane Pickle Company?

Mr. Davenport: May it please the court, I object. I think we should get down to this case.

Mr. Bryant: I want to give the jury some idea of the nature and character of the business.

Mr. Davenport: My objection is that the Silver Lane Pickle Company is not a party to the case. The person on the stand is the one who has executed this contract, and I ask your Honor to exclude the evidence.

Mr. Bryant: The question is as to the size of the Silver Lane Pickle Company. It will appear before we get through that the Silver Lane Pickle Company is interested in the matter.

The Court: On the question of damages, you mean?

Mr. Bryant: Not on the damages, but in the whole trade; in the whole purchase.

The Court: It isn't the plaintiff.

Mr. Bryant: Well, that is quite true. I merely want to know whether it is a large concern or a small concern.

The Court: That's all right.

Q. 24. Is it a large concern or a small concern?

A. It is considered the largest concern in the East.

Q. 25. Well, what do you mean by the "East," New England?

A. New England and New York; anything this side of Pittsburg.

[fol. 15] Q. 26. It is the largest pickle concern this side of Pittsburg?

A. Yes.

Q. 27. Do you know the defendant in this case?

A. I do.

Q. 28. What is his business?

A. Pickle business.

Q. 29. And where is he located?

A. South Deerfield.

Q. 30. A similar business to yours?

A. Why, somewhat. I think the most of his business—of course, I don't know his business, but most of his business is in salt and vinegar pickles. Of course, he doesn't make a full line, to my knowledge.

Q. 31. Where is his plant?

A. South Deerfield.

Q. 32. Are you familiar with that plant?

A. Why, yes; I have been there a good many times; went over and been over it.

Q. 33. Did you—without going into details at all—in the late summer or early fall have any negotiations with Mr. Swan relating to the purchase of his plant?

The Court: What year?

Q. 34. Late in the year 1923?

A. Yes.

Q. 35. Where did you have those negotiations?

A. At his office.

Q. 36. When did you see him?

A. About, I think it was, the first day of September.

Q. 37. 1923?

A. No. It was the twenty-seventh day of August the first time I saw him.

Q. 38. And had some negotiations relative to the purchase of his plant?

A. Yes.

Q. 39. What time of day was that?

A. Why, I should say I saw him about 7.30, I guess. I was at his place about quarter of seven. He wasn't in. We were sitting on his front steps.

Q. 40. Waiting for him?

A. Yes; about quarter of seven.

Q. 41. What day did you say?

A. The 27th of August.

Q. 42. When did you next see him on the same subject?

A. It was the following—I think this was on a Monday, as near as I can recollect without keeping any dates. It was on the following Tuesday.

Q. 43. Now, at this first interview was there any talk at all relating to buying and selling of the place?

A. The first?

Q. 44. Yes.

A. Yes; I——

[fol. 16] Mr. Davenport: Well, you have answered the question.

Q. 45. There was talk relating to the sale and purchase of the place?

A. Why, on my way to New Hampshire I stopped in there.

Q. 46. Did you go to his place at his invitation or on your own?

A. Why, I stopped and saw him as a friendly call.

Q. 47. And he talked about it?

A. He put it up to me. I had no more idea when I stopped there of buying a pickle plant than I——

Mr. Davenport: Just a minute. What is the next question?

Q. 48. And he put it up to you, you say?

A. Yes.

Q. 49. And you went there at his suggestion again?

A. Yes.

Q. 50. And when?

A. A week from the following Tuesday. This was on a Monday, as I recollect.

Q. 51. And you had further negotiations with him?

A. I didn't see him that morning. He was at his house.

Q. 52. You went there for the purpose of having negotiations, didn't you?

A. Yes; as I agreed to.

Q. 53. You went there by appointment with him?

A. Yes.

Q. 54. On the second occasion. And then on a new appointment did you go there the third time?

A. I did. I saw the foreman, and the wife showed me—

Mr. Davenport: I object.

Q. 55. And what was the third time?

A. The appointment was to be on the following Friday, but I didn't go until the following Tuesday; the next week Tuesday.

Q. 56. Do you know what day it was; that third interview?

A. It was on the thirteenth day of September.

Q. 57. September 13th.

A. Yes, and I think it was on a Tuesday.

Q. 58. When you went to his house or place of business the second time, what time did you go there?

A. I was up there about quarter of seven in the morning, and I went up to his house—

Q. 59. Never mind. You went there about quarter of seven in the morning?

Q. 60. Now, what time did you go there on the third occasion?

A. About the same time; about seven o'clock.

[fol. 17] Q. 61. What time did you meet him on the third occasion?

A. He wasn't in and I went over to the hotel and came back, and I was sitting in the car when he did come back.

Mr. Davenport: I pray your Honor's judgment. I would like to have the witness answer the question.

The Court: Yes.

Q. 62. What time was it when you saw him?

A. About eight o'clock.

Q. 63. The first interview you had you were there before seven o'clock; the next interview you went there before seven o'clock; and the third interview when you met him was at eight o'clock. You were there before seven?

A. I was there every morning before seven, but I didn't always meet him before seven.

Q. 64. Did you have any negotiations relative to the sale and purchase on the third occasion? I am asking if you had any extensive negotiation with him.

A. I did.

Q. 65. As a result of the negotiations where did you go?

A. We came to an agreement—

Mr. Davenport: No; I object. I ask to have that stricken out.

The Court: It may. The answer is not responsive.

Q. 66. Where did you go?

A. We finally went to Davenport & Fairhurst's offices.

Q. 67. To Davenport & Fairhurst's offices. These gentlemen who are here?

A. Yes.

Q. 68. And why did you go to their office? At whose suggestion did you go to their office?

A. At Mr. Swan's suggestion.

Q. 69. And what was your object in going to their office?

A. We undertook to draw the contract up ourselves, and we weren't getting along very good, and we thought it would be a shorter form and be easier, quicker and better. He suggested that we employ these men and it wouldn't cost me a cent.

Q. 70. You went there at his suggestion?

A. Yes.

Q. 71. And at what time of day did you go to their office?

A. Right after lunch. I went to lunch in Greenfield and was in their office about 1:30.

Q. 72. I show you a paper and ask you to examine it and [fol 18] tell the jury what it is. What is that paper?

A. The contract that we drew up.

Q. 73. The contract drawn by whom?

A. Mr. Davenport and Mr. Fairhurst.

Q. 74. The contract that you have told the jury that they drew up?

A. Yes.

Q. 75. Is that [showing] your signature?

A. It is.

Q. 76. Is that [showing] Mr. Swan's signature?

A. It is.

Q. 77. Did you see him make it in the presence of Mr. Fairhurst?

A. Yes, sir.

Mr. Bryant: We offer this paper.

[Paper so identified and offered was received in evidence, being marked "Plaintiff's Exhibit A".]

PLAINTIFF'S EXHIBIT "A"

"Memorandum of agreement made this thirteenth day of September, A. D. 1923, by and between Edward P. Swan of South Deerfield, in the County of Franklin and Commonwealth of Massachusetts, doing business as E. P. Swan Company, Party of the First Part, and Ray C. Simmons of Silver Lane, in the State of Connecticut, Party of the Second Part:

Witnesseth: The Party of the First Part does hereby agree to and with the Party of the Second Part to sell to said Party of the Second Part all that land situate on the south side of South Mill River Road in South Deerfield, so called, containing two acres, more or less, on which is situate the pickle factory, sheds and four tenement building of the Party of the First Part, together with one Reo truck, one Ford truck, all vinegar, cooperage (except sixty-five one-headed barrels now on said premises) and equipment of every name, nature and description, now on said premises and used by the Party of the First Part in connection with the operation of the pickle business of said Party of the First Part; and together with the good will of said pickle business.

The Party of the Second Part agrees to and with the Party of the First Part that for and in consideration of said purchase he will pay to the Party of the First Part the [fol. 19] sum of Fifteen Thousand Dollars, as follows, viz: Five Hundred Dollars to be paid on the signing of this agreement, and check for which is hereby acknowledged; Twenty-five Hundred Dollars to be paid on or before October 1st, 1923, the balance of said purchase price, namely Twelve Thousand Dollars shall be paid by the note of the Party of the Second Part to the order of the Party of the First Part carrying interest at six per cent, semiannually, and payable on demand.

The Party of the Second Part further agrees to and with the Party of the First Part to execute, acknowledge, and

deliver to the Party of the First Part as security for said note, suitable mortgages, in standard form, covering the property conveyed.

The Party of the First Part further promises and agrees to and with the Party of the Second Part to sell to said Party of the Second Part all of the pickles now in tanks on said premises, and the Party of the Second Part promises and agrees to pay therefor the sum of Four Dollars per thousand, according to the receipt book (cucumbers received) of the Party of the First Part as of October 1st, 1923, which payment is to be made by note of the Party of the Second Part to the order of the Party of the First Part for the full amount due therefor, on demand and carrying interest at six per cent per annum, and carrying the signatures thereon of F. C. Gould and Thomas J. Molunphy, both of said Silver Lane, as joint makers.

It is mutually agreed that the taxes on said property are to be apportioned by the parties hereto as of the date of delivery of the deed.

The time set for the performance of this agreement is on or before October 1st, 1923, and the place the office of Davenport & Fairhurst, Greenfield, Mass.

Tender of performance on the part of the Party of the First Part shall be sufficient if on said date a deed and bill of sale, in accordance with the provisions hereof, is left with said Davenport & Fairhurst for delivery to the Party (fol 20) of the Second Part; and tender of performance shall be sufficient on the part of the Party of the Second Part if on said date the sum of Twenty five Hundred Dollars, plus suitable notes and mortgages, are left with said Davenport & Fairhurst for delivery to the Party of the First Part.

In the event that the Party of the Second Part fails to perform any of the promises and agreements herein contained, the amount this day paid shall be retained by the Party of the First Part as liquidated damages for said breach.

Time is of the essence of this contract and said agreement is binding on the executors and administrators of the respective parties hereto.

In witness whereof the parties hereto have hereunto interchangeably set their hands and seals the day and year first above written.

(Signed) Edward P. Swan, Ray C. Simmons. (Seal.)

In the presence of Charles Fairhurst."

Q. 78. Now, Mr. Simmons, this contract, as has been read to the jury, shows that you were to purchase certain pickies in brine: "The party of the first part is to sell to the party of the second part all the pickles"—or, before I ask you that question let me ask you: You were to pay for those pickles by a note to be signed by you and to bear the names of F. C. Gould and Thomas Molumphy, as joint makers as the contract provides. Who is F. C. Gould and Thomas Molumphy?

Mr. Davenport: Just a moment, may it please the court. I don't see how that is material.

The Court: I don't at the present moment; but I can see how it may be made material.

Mr. Bryant: I can ask that question later, so I will waive it for the present.

Q. 79. This contract, Mr. Simmons, calls for the payment of "all of the pickles now in tanks on said premisses, and the party of the second part promises and agrees to pay therefor the sum of four dollars per thousand, according to the [fol. 21] receipt book, encumbers received, of the party of the first part." What was the meaning? How were you to determine the amount that you were to pay for those pickles?

Mr. Davenport: I pray your Honor's judgment. The contract specifies.

Mr. Bryant: It speaks there of the receipt book.

The Court: It is ambiguous.

Mr. Bryant: It is ambiguous. It needs a word of explanation.

Mr. Davenport: "Four dollars a thousand according to the receipt book." I don't see any ambiguity there. ✓

Mr. Bryant: I will get at in a different way.

Q. 80. Did you at any time determine the amount that was to be paid under that clause of the agreement, Mr. Simmons?

A. I did.

Q. 81. And do you remember what the amount was?

A. It was about three—

Q. 82. No; the amount of money paid.

A. Fifteen thousand dollars.

Q. 83. I show you a paper for the purpose of refreshing your recollection. I show you that paper. Will you examine it and, if you can, tell the amount that was to be paid? I ask you simply for the amount that was to be paid for the pickles.

A. \$14,905.04.

Mr. Davenport: That is the correct amount, may it please the court.

Q. 84. How much?

A. \$14,905 04.

Q. 85. Very well.

The Court: There is no dispute about it.

Mr. Davenport: No.

The Court: All right.

Q. 86. Now, I want to know, Mr. Simmons, how you determined that amount.

Mr. Davenport: How is that material, may it please the court?

The Court: I shall rule that it is not material. There is no dispute about the amount.

Mr. Bryant: Very Well.

[fol. 22] The Court: This was to be paid by a note signed by two individuals?

Mr. Bryant: It was to be paid by a note signed by three individuals.

The Court: There is no dispute about the amount?

Mr. Bryant: No.

Q. 87. I show you a paper, Mr. Simmons, and ask you if that is your signature?

A. It is.

Q. 88. If you can identify that paper and tell what it is?

A. Yes, sir. That is a check—

Q. 89. Wait a minute. I won't ask you to tell me what it is yet.

Mr. Davenport: All right. Put it right in.

Q. 90. What is this paper?

Mr. Davenport: It will show for itself.

The Witness: It is my personal check that I gave Mr. Swan at the time that contract was drawn up on the thirtieth day of September.

Q. 91. In payment of the \$500.

A. Yes, sir, in payment of the \$500.

Q. 92. The paper speaks of checks received. Is that [pointing] the check that was received?

A. Yes, sir.

Mr. Davenport: We agree that this was received.

The Court: Let it go in.

[Paper so identified and offered was received in evidence, being marked "Plaintiff's Exhibit B."]

STATEMENT RE PLAINTIFF'S EXHIBIT "B"

Mr. Byrant: "The East Hartford Trust Company, East Hartford, Connecticut, September 13, 1923. Pay to the order of E. P. Swan Five Hundred Dollars. R. C. Simmons. Collectable at par through New York and Boston Clearing House." Number blank. It is endorsed on the back: "E. P. Swan. Pay to the order of any bank, banker or trust company. Prior endorsements guaranteed. September 15, 1923, Federal Reserve Bank of Boston." There is an indorsement of some bank here that is rather indistinct. I don't know that it is material in any way. I won't read it. The check is duly cancelled by the East Hartford Trust Company.

[fol. 23] Q. 93. In compliance with the terms of the contract it was agreed that the amount to be paid for the pickles was \$14,905—

Mr. Davenport: Perhaps I can aid you, brother Bryant, by consenting to some of these things without your identifying them. I thought you were going to put in the elements that were in the contract.

Mr. Bryant: I am going to put them in. I want to offer this note. Do you object to that note?

Mr. Davenport: No. Put in all the rest of them if you want to.

Q. 94. Does this paper bear your signature?

A. It does.

Q. 95. What other signatures does it bear?

Mr. Davenport: Doesn't it show?

The Witness: Thomas J. Molumphy and Frank C. Gould.

Q. 96. Thomas J. Molumphy and Frank C. Gould. Did you see those gentlemen sign it?

A. Yes, sir.

Q. 97. Are they the men that are mentioned in the contract—

A. Yes, sir.

Mr. Davenport: I pray your Honor's judgment. I agreed that that note might go in.

Mr. Bryant: You agree that it was executed?

Mr. Davenport: Yes, sir.

The Court: That is a note for \$14,905 signed by this witness and two others or three others?

Mr. Davenport: Three others. Now I will also agree that there was a note for \$12,000 with a mortgage to go with it.

Mr. Bryant: Also a mortgage on the personal property?

Mr. Davenport: Also a mortgage on the personal property; yes.

The Court: I should think with that admission all you need to do would be to read the notes offered as exhibits.

Mr. Bryant: Well, I will read this note now.

PLAINTIFF'S EXHIBIT "C"

"\$14,905.04. October 1st, 1923. For value received I promise to pay to Edward P. Swan or order fourteen thousand nine hundred five and four one hundredths dollars on [fol. 24] demand, with interest at the rate of six per centum

per annum. Ray C. Simmons, Thos. J. Molumphy, Frank C. Gould."

[Paper so identified and offered was received in evidence, being marked "Plaintiff's Exhibit C."]

PLAINTIFF'S EXHIBIT "D"

"\$12,000. October 1st, 1923. For value received I promise to pay to Edward P. Swan or order twelve thousand and no hundred dollars on demand with interest semi-annually at the rate of six per centum per annum, during said term, and for such further time as said principal sum, or any part thereof, shall remain unpaid. Signed in presence of Charles Fairhurst. Secured by mortgage of real estate in Deerfield, Mass., to be recorded in Franklin County Registry of Deeds."

Will you kindly mark that as Plaintiff's Exhibit D?

[Paper so identified and offered was received in evidence, being marked "Plaintiff's Exhibit D."]

STATEMENT RE PLAINTIFF'S EXHIBIT "E"

This [showing] is a long printed mortgage, and I won't trouble you to read that, because you are more or less familiar with mortgages.

The Court: It is the usual form of the Massachusetts mortgage?

Mr. Bryant: It is the usual form of Massachusetts mortgage. I assume that it is in proper form because it is from the office of Havenport & Fairhurst.

The Court: Is it signed and duly executed?

Mr. Bryant: Yes. Signed by Ray C. Simmons and acknowledged before Charles Fairhurst, Notary Public.

[Paper so identified and offered was received in evidence, being marked "Plaintiff's Exhibit E."]

STATEMENT RE PLAINTIFF'S EXHIBIT "F"

That covers the real estate that was described in the contract that I read to you gentlemen. I will now offer as Plaintiff's Exhibit F a mortgage of personal property cov-

ering "one Reo truck, one Ford truck, all vinegar, cooperage, except 65 one-headed barrels now on premises this day purchased by the vendor from the vendee, and equipment of every name, nature and description now on said premises and used in connection with the operation of a [fol. 25] pickle business. Together with the good will of said pickle business."

The Court: That secures the \$12,000 note?

Mr. Bryant: "In consideration of \$12,000."

The Court: Additional security?

Mr. Bryant: Yes; collateral security for the payment of that note.

[Paper so identified and offered was received in evidence, being marked "Plaintiff's Exhibit F."]

Q. 98. After completing the execution of this contract at Greenfield on the 13th of September you went back to East Hartford?

A. I did.

Q. 99. Subsequent to that, did you have any correspondence with Mr. Swan relating to his contract?

Mr. Davenport: Yes or no.

Q. 100. Did you have any correspondence?

A. Yes.

Q. 101. I show you a letter here and ask you if you will identify that letter?

A. Yes, sir. That is the letter received from Mr. Swan.

Mr. Bryant: Any question about that signature?

Mr. Davenport: Not the slightest. I object to it.

Mr. Bryant: Oh, I thought you admitted it. I offer that letter if your Honor please.

Mr. Davenport: This has absolutely nothing to do with it.

Mr. Bryant: It has everything to do with the contract. I offer it as evidence of the kind of property.

Mr. Davenport: "You spoke about giving me a check in full for pickle stock and trust you will do so, as it would be more convenient for me." His contract was that he should take a note for it. They didn't come together on that at all. It is simply that he spoke about it, but he didn't do it. The wording of that has already been in evidence.

The Court: This would show that the parties contemplated a check for the payment of \$2,500. Here was a note to be given, and he says: "In lieu of that note you have suggested a check I would like to have you give it to [fol. 26] me." He was suggesting modifying the terms of the contract.

Mr. Bryant: No; he wasn't suggesting modifying the terms of the contract.

The Court: Oh, yes, he was; because if this letter had been acted upon the contract would have been materially modified. Of course, I understand that you do not offer it to alter the terms of the contract.

Mr. Bryant: Yes; but I offer to show that Mr. Swan has received that personal check. He has been talking about another form of payment, and he gave him a note for \$15,000. He asked for a check for \$15,000.

The Court: Does that have the slightest tendency to show that the parties of the contract thought \$2,500 was to be taken by check? I could find that a good check would be sufficient performance, but it would not be because of that letter.

Mr. Bryant: It tends to show Mr. Swan's attitude toward that contract.

The Court: It is quite a different thing to take a check from legal tender. I still think that it has no tendency to show what the parties had in mind with reference to the \$2,500 payment.

Mr. Bryant: Doesn't it have a bearing in reference to the performance of the contract? I don't claim it as affecting the \$2,500 payment, but I claim it shows the way that Mr. Swan expected the contract would be performed. They had been negotiating. Now that contract has got to be carried out, and that is the way that it was to be carried out.

Mr. Davenport: This hasn't anything to do with the \$2,500.

Mr. Bryant: No, we don't claim —

Mr. Davenport: What my brother is offering this is for —

The Court: It couldn't be used as a waiver.

Mr. Bryant: I am not offering it for that purpose; I don't make that claim. I am offering it to show the way that Mr. Swan expected the contract would be performed.

The Court: The finding that I might make wouldn't be because of that letter. Do you know he had knowledge of [fol. 27] it? The question is, whether he had a right to insist upon something else if he wanted to. That is really the question. I don't believe that letter would help. I think any evidence of the defendant's objection—it doesn't help me, of course. Well, if it is going up, I would like to have all the evidence you have got in. You propose to except if I admit?

Mr. Davenport: Yes, your Honor.

The Court: My only point is that if this case is going up, I would like to have all the evidence go in, and that question could be saved with the others. I am inclined to agree with you, Mr. Davenport, that it isn't material, but if you think it is, I think I will let it in.

Mr. Bryant: Yes.

The Court: Subject to the defendant's exceptions, I will admit it.

[Paper so identified and offered was received in evidence, being marked "Plaintiff's Exhibit G."]

PLAINTIFF'S EXHIBIT "G."

Mr. Bryant: This is on the letterhead of Mr. Swan.

"E. P. Swan Company September 22, 1923, Silver Lane Pickle Company, Silver Lane, Connecticut. Gentlemen: You spoke about giving me a check in full for pickle stock and trust you will do so as it would be more convenient for me. Yours truly, E. P. Swan."

Q 102 Mr. Simmons, we have now come down to the first day of October, 1923. You remember that, do you?

A I do.

Q 103 Did you come up to Deerfield—South Deerfield and Greenfield?

A I did.

Q 104 About what time did you get to South Deerfield?

A Between half past nine and ten.

The Court: A. M.?

The Witness: A. M.

Mr. Bryant: The forenoon, yes, your Honor.

Q. 105. About what time did you get to Greenfield?

A. Around 12 o'clock; a little later.

Q. 106. Where did you go in Greenfield?

A. I went to Davenport & Fairhurst's office.

[fol. 28] Q. 107. Who was with you?

A. Mr. Gould.

Q. 108. Anybody else?

A. No; not at that time; the first time.

Q. 109. Mr. F. C. Gould?

A. Mr. F. C. Gould.

Q. 110. Better put those initials in.

The Court: Who was with you the first time?

The Witness: Mr. Gould was.

Q. 111. Before you went to Greenfield you went to South Deerfield?

A. Yes, sir.

Q. 112. And where did you stop there at South Deerfield?

A. I stopped at Mr. E. P. Swan's office.

Q. 113. And did you find him there?

A. No; the place was locked up.

Q. 114. Where did you go then?

A. I went up to his house.

Q. 115. Make inquiries for him?

A. Yes.

Mr. Davenport: Just a moment; I don't see how it is material, may it please the court. The delivery of these papers should be at our office.

The Court: Things might happen. Let's have the whole story.

Q. 116. You went to his office and he wasn't there?

A. Yes.

Q. 117. And you went to his house and he wasn't there?

A. Yes.

Q. 118. Did you make any efforts to ascertain his whereabouts?

Q. 119. Well, then, you did not ascertain?

A. No, sir.

Q. 120. What did you do?

A. We couldn't find anything of him and I thought we would go to the office to see if — left any word at the office.

Q. 121. Went to Greenfield to the office of Davenport & Fairhurst?

A. Yes.

Q. 122. And who did you see there?

A. I saw Mr. Fairhurst.

Q. 123. Did you disclose to Mr. Fairhurst the nature of your business?

A. Yes, sir. I told him we stopped at Mr. Swan's house, but no one in the town of South Deerfield knew where he was.

Q. 124. What information did he give you? Did you tell him you were ready to carry out your contract with Mr. Swan?

A. Yes, sir.

[fol. 29] Q. 125. Were you ready?

A. Certainly I was ready.

Q. 126. Did you have all these notes, these exhibits, with you at the time? Did you have the \$14,000 note?

A. I had a note in my pocket, but we didn't use that note, but that is one that Fairhurst wrote out himself in the office.

Q. 127. Did you inquire for Mr. Swan?

A. Yes, sir; but he wasn't there.

Q. 128. What information did you get regarding him?

A. They thought it was very funny that he wasn't there. And we went into his office probably at least half a dozen times. And about two or half past he said that Mr. Swan had called up and said that he would be there by three o'clock and would be ready to go ahead then.

Q. 129. That Mr. Swan would be there by three o'clock and ready to go ahead then? Is that what Mr. Fairhurst told you?

A. Yes.

Q. 130. You went again at three o'clock, did you?

A. Yes, sir.

Q. 131. And were you there—

A. We stayed in Mr. Fairhurst's office.

Q. 132. Did you make known to Mr. Fairhurst your purpose in being there?

A. Certainly I did.

Q. 133. And were you ready and willing to carry out your contract?

A. Certainly I was.

Mr. Davenport: Just a moment. I ask to have that struck out. That is a conclusion.

The Court: Yes, that is a conclusion. Let's find out what he did and what took place.

Mr. Davenport: Your Honor will have that stricken out?

The Court: Yes.

Q. 134. Well, you went to Mr. Fairhurst's office, Davenport & Fairhurst's office about 3 o'clock.

A. About half past two or quarter of three, because they had reported and said that he would be there at three o'clock, and we were there a half an hour before waiting for him.

Q. 135. And how long did you wait?

Mr. Davenport: He said half an hour.

[fol. 30] Mr. Bryant: He said he was there a half an hour before three o'clock.

The Witness: We waited there until Mr. Swan showed up between five and six.

Q. 136. Mr. Swan came in between five and six.

A. Yes.

Q. 137. After Mr. Swan came in did he execute a deed of the property?

A. Why, I think he did. He had the deed with him. I never had the deed.

Q. 138. Did you see the deed before he came in?

A. Papers which I suppose was the deed—

Q. 139. No; but did Mr. Fairhurst show you any deed before he came in?

A. No, sir.

Q. 140. Did Mr. Fairhurst decline to do business with you until Swan came in?

A. He said, wait until Mr. Swan came in. He said he would be there at three o'clock and then he would be ready to go ahead.

Q. 141. And you waited how long before he came in?

A. Half past five.

Q. 142. Now go on and tell the jury what took place.

A. They signed up the papers —

Q 143. Now, wait a minute. Be a little more specific. The stenographer wants to take it and the jury don't know what you mean by that.

A. Mr. Swan came in the back way, and when they came up in this other room where we were, Mr. Fairhurst said: "Now we are ready to go ahead." We went into the office and they brought out the papers; the mortgages that they wanted me to sign. I signed up and I gave him my notes, and they were signed right there by Mr. Gould and Mr. Molumphy and myself; the notes and mortgages. We gave him a cashier's check for the \$2,500, and he says —

Q 144. Describe the whole circumstances. On what bank was the cashier's check?

A. On the South Deerfield bank.

Mr. Davenport: Just a minute. May it please the court, I ask to have that struck out. I supposed they were going to produce the check.

Mr. Bryant: We are going to.

[fol 31] Mr. Davenport: Then produce it.

Mr. Bryant: We shall produce it in due time.

Mr. Davenport: Well, with that understanding I have no objection.

Q 145. You say you signed the mortgages and the notes and produced the check?

A. Yes.

Q 146. In the meantime did Mr. Swan sign any papers?

A. Why, I think he did. I know he signed a paper, but I never had —

Q 147. Well, was it a paper something of the appearance similar to the one you signed?

A. It was a deed of the property.

Q 148. It was a deed of the property.

A. It was supposed to be a deed. It looked like a deed, not having it to read —

Q 149. You didn't read it?

A. No, sir, I never had it to read.

Q 150. You had signed all these papers?

A. Yes, sir.

Q 151. And what took place then?

A. He wanted to know if that's all I had.

Q. 152. What was it now that he was talking about?

A. When I passed him the cashier's check he looked at it and he says: "Is that all you have got to pay for this?"

Q. 153. What time of night was this?

A. It was about six thirty at night. He says: "Is that all you have got to pay for this with?" And I says: "Yes; unless you want my personal check."

The Court: Who said this?

The Witness: Mr. Swan. And I said that I would give him my personal check if he would rather have it. He says: "If that's all you have got to pay for this——"

Q. 154. Did he have any other conversation with anyone else?

A. He says: "Mr. Fairhurst, am I obliged to take this?" Mr. Fairhurst says: "I wouldn't say that you are obliged to take this, but I would like to get hold of a few of those." And he says: "If I am not obliged to take it I won't," and he picks up his hat and says "Good night," and I didn't see anything more of him.

Q. 155. What did he do?

A. He went out of the office.

Q. 156. He picked up his hat, said good night and walked out of the office?

A. Yes, sir.

Q. 157. Any further conversation with Mr. Fairhurst [fol. 32] that night that you recall?

A. Why, he stayed—Mr. Fairhurst stayed there for a minute or two. We had a conference outside. He says: "Well, he is gone. He is kind of a funny man. You can't tell much about him——"

Mr. Davenport: That wasn't in Mr. Swan's presence?

The Witness: No, sir.

Mr. Davenport: And I ask to have that struck out.

The Court: Yes, it may be.

The Witness: No, sir; he wasn't. I never saw him again that night.

Mr. Davenport: No one has asked you any questions, Mr. Simmons. I ask to have that struck out.

The Court: Yes.

Q. 158. You gathered up your papers?

A. Yes.

Q. 159. And went back very suddenly.

A. We went down to South Deerfield, and from there we came along down.

Mr. Bryant: I think you may inquire.

Cross examination.

By Mr. Davenport:

X Q. 160. You had an attorney there present with you at the office?

A. I did.

X Q. 161. Mr. Lawler?

A. Yes, sir.

X Q. 162. After Mr. Swan came in there was some conversation in the presence of Mr. Lawler, Mr. Swan and Mr. Fairhurst in Mr. Fairhurst's office?

A. Why, yes; I suppose there was.

X Q. 163. You were in there talking for something like a half an hour?

A. No; I wouldn't say we were in there half an hour.

X Q. 164. Then you and Mr. Lawler and the other two gentlemen who were with you retired from the room where Mr. Fairhurst was?

A. Stepped to the door. They were out and they called me out.

X Q. 165. You held a conference at that time in another room?

A. Yes.

X Q. 166. Then you returned to the room where Mr. Fairhurst and Mr. Swan were and told them you had concluded not to go through with the contract?

A. No.

[fol. 33] X Q. 167. Nothing to that effect?

A. No, sir.

X Q. 168. You didn't make that statement?

A. Never made it.

X Q. 169. Wasn't made by Mr. Gould in your presence?

A. What's that?

X Q. 170. Do you say that it wasn't made by Mr. Gould or someone in your presence?

A. No, sir; it was not said that we wouldn't go through with the contract.

X Q. 171. I didn't ask you that. Did you say when you returned into the room: "We have concluded not to go through with the contract?"

A. No, sir; I never did.

X Q. 172. There was some discussion there then?

A. Why, some.

X Q. 173. In which Mr. Gould and Mr. Swan participated mainly?

A. I don't know what there was. I was attending to my part of the business; I don't know. I was with Mr. Fairhurst—

X Q. 174. I haven't asked you anything that calls for that. Now, the papers so far as Mr. Swan's were concerned, the deed and the bill of sale, were offered to you by Mr. Fairhurst?

A. Why, yes.

X Q. 175. And in turn you offered these mortgages and notes which have been put in?

A. Yes.

X Q. 176. Did Mr. Swan say "All I want is my money", or words to that effect?

A. Why, something to that effect.

X Q. 177. Yes. And did Mr. Gould say "I have it here in my pocket"?

A. I wouldn't say; I don't know just what he did say.

X Q. 178. You were there?

A. Yes, sir.

X Q. 179. You didn't have the check?

A. No; Mr. Gould stopped and got it. I had a check in my pocket.

X Q. 180. No matter. You didn't have the check?

A. I didn't have that particular check.

X Q. 181. You didn't offer any certified check to Swan or anything of that kind?

A. I told him I would give him my personal check.

X Q. 182. I see. You told him you would give him your personal check.

A. I had the check.

[fol. 34] X Q. 183. You go along with me as we are going.

Mr. Bryant: He did offer it.

Mr. Davenport: Now, wait a minute. We will see.

X Q. 184. Mr. Swan said he wanted his money. That's right, is it not?

A. Yes, something to that effect.

X Q. 185. Mr. Gould says "I have it in my pocket", and drew from his pocket a check, did he not?

A. Yes; a cashier's check.

X Q. 186. I said, he drew from his pocket a check?

A. Yes.

X Q. 187. Yes.

Mr. Bryant: He said it was a cashier's check.

Mr. Davenport: Just answer my questions.

Mr. Bryant: Then I will object to that question.

Mr. Davenport: You can straighten him out if you want to.

Mr. Bryant: My brother is getting excited.

Mr. Davenport: No, I am not excited; but if you are going to be particularly technical—

Mr. Bryant: I want it to go in just as it happened.

The Court: We will take it that he drew out of his pocket a cashier's check.

X Q. 188. When he drew it from his pocket, Mr. Swan said to Mr. Fairhurst, did he not, "Am I obliged to take a check?"

A. No, sir; he never mentioned that.

X Q. 189. Did Mr. Fairhurst say "No; you are not obliged to take a check"?

A. He didn't say that. He said: "I wouldn't say that you are obliged to take that."

X Q. 190. Did he say when Mr. Gould presented the check to Mr. Swan—did Mr. Swan ask Mr. Fairhurst: "Am I obliged to accept a check?"

A. No, sir.

X Q. 191. Or words to that effect?

A. He said: "Am I obliged to take that?"

X Q. 192. Well, what did the "that" refer to?

A. To a cashier's check.

X Q. 193. It referred to the piece of paper that Mr. Gould had in his hands, did it not?

A. I passed to Mr. Fairhurst.

X Q. 194. Answer that question.

A. Yes.

X Q. 195. So he did ask Mr. Fairhurst if he was obliged [fol. 35] to take a check; the word "that" referring to the check?

A. If that is the way you put it.

X Q. 196. Mr. Fairhurst's reply was: "No; you are not obliged to take it."

A. No, it wasn't.

X Q. 197. Well, words to that effect.

A. No. He says: "I wouldn't say that you are obliged to take it, but I would like to get hold of a few of them myself." I think those are the words that he said, to get it exact.

X Q. 198. Mr. Swan's question was, whether he was obliged to take a check in payment under this contract?

A. I don't know what—

X Q. 199. That is what you understood, was it not?

A. Why, I wouldn't say. I don't know.

X Q. 200. You don't know?

A. I don't know whether he wanted my private check or a cashier's check.

X Q. 201. He then asked Mr. Gould if he had the money with him?

A. No, sir.

X Q. 202. Or if he had anything else beside the check?

A. No.

X Q. 203. What did he say to Mr. Gould about money?

A. The only thing I know is what he said to me.

X Q. 204. You said a moment ago that he said something whether he had anything else beside the check.

A. He says to me: "Is that all you have got to pay for it?" And I says: "No; had you rather have my personal check?" And he says: "No; I don't want your check." Swan say: "All I want is my money."

X Q. 205. One question: Mr. Simmons, at no time did you tender to Mr. Swan any money on the day of this contract—on the first day of October?

Mr. Bryant: What do you mean by "money"?

The Witness: What kind of money do you mean?

X Q. 206. Don't you know what "money" is?

A. No, I do not.

X Q. 207. I see you don't. Then you did not tender or offer to tender to him any United States currency?

A. Any United States currency? A cashier's check is the best—

X Q. 208. That's my question. You offered none of the [fol. 36] stuff which we know as money?

A. I offered the same as I had given him before.

The Court: It is pretty clear that all he offered was the cashier's check; nothing else.

Mr. Davenport: That's all.

WALTER F. GOREY (sworn).

By Mr. Bryant:

Q. 1. What is your full name, please?

A. Walter F. Gorey.

Q. 2. Walter F. Gorey?

A. Right.

Q. And where do you live, Mr. Gorey?

A. In South Deerfield, Massachusetts.

Q. 4. What is your business?

A. Cashier of the Produce National Bank.

Q. 5. Of South Deerfield?

A. Of South Deerfield.

The Court: What bank?

The Witness: Of the Produce National Bank of South Deerfield.

Q. 6. How old a bank is that?

A. It was organized in 1906.

Q. 7. What is its capitalization?

A. Capital is 50,000.—

Mr. Davenport: Wait a moment. I object.

The Court. I don't think we need to waste any time on

that. A check on that bank is as good as on any bank. Is that right, Mr. Davenport?

Mr. Davenport. Exactly.

Mr. Bryant: Well, perhaps you won't object to this question.

Mr. Davenport: I can't tell until I hear it.

Q. 8. How many depositors have you?

Mr. Davenport: I object.

The Court: I don't think it is necessary to go into that. As long as it is solvent a draft on it is as good as on another bank.

Q. 9. Whether or not on the first of October, 1923, Mr. Gorey, you gave a check on the bank of which you are treasurer in the amount of \$2,500 to any gentleman from Connecticut?

A. I did.

Q. 10. And to whom did you give it?

Mr. Davenport: I object, may it please the court.

[fol. 37] The Court: You may answer the question.

The Witness: I gave it to Mr. F. C. Gould.

Q. 11. Was he alone at that time when he secured this check?

A. Yes.

Q. 12. Have you the check with you, Mr. Gorey?

A. I have; yes, sir.

Q. 13. May I see it?

A. [Produces paper and hands same to counsel.]

Mr. Davenport: I object to it; that it isn't in the same condition as at the time the paper was given.

The Court: Well, it is marked "Paid."

Mr. Davenport: No; it was not endorsed at the time.

The Court: Well, I will admit it with the understanding and explanation to the jury that the endorsement was not on this. It was pulled out of Mr. Gould's pocket—

Mr. Davenport: All you can do is to state that it is a check given to Gould.

The Court: Check admitted. I will explain to the jury that they are not to consider the endorsement on the back.

[Paper so identified was offered and received in evidence, being marked "Plaintiff's Exhibit H."]

STATEMENT RE PLAINTIFF'S EXHIBIT "H"

Q. 14. Now, as I understand it, Mr. Gorey, this check which I will read—"The Produce National Bank, certificate of deposit, South Deerfield, Massachusetts, October 1st, 1923. F. C. Gould has deposited with this bank, Honor for not over \$2,500, payable to the order of himself, on return of this certificate properly endorsed, W. F. Gorey, Cashier." Now, on the date named, October 1st, 1923, you gave this check to Mr. F. C. Gould?

A. Yes, sir.

The Court: It is a certificate of deposit?

Q. 15. Just distinguish between a certificate of deposit and a cashier's check, Mr. Gorey.

A. The only way I can answer that is to quote the National Bankers Association definition of it; and that gives it as synonymous in meaning with a slightly different wording. I see no difference.

Q. 16. So when a representative amount of money is deposited with you and you are asked for a cashier's check you give a certificate of deposit?

A. That is the only form that we give.

Q. 17. And you gave that to Mr. Gould on that day?

A. I did.

Q. 18. And he took it away?

A. That is true.

Q. 19. And at the time when you gave it to him there was no endorsement on it?

A. When I handed it to him there was not.

Q. 20. When did you come into possession of it again?

A. When it was received through the mail from the clearing house in the ordinary course of business.

Q. 21. Which was probably some days afterward.

A. The cancellation date will show that. I can't tell from memory.

Q. 22. "Pay to the order of the Federal Reserve Bank of Boston. Prior endorsement guaranteed. The First National Bank of Boston. October 5, 1923." So that you received it back in the ordinary course of banking business?

A. The cancellation date will show the exact date that I received it.

Q. 23. That is the perforated—perhaps you can tell us about it. I don't know enough about it [handing paper to witness].

A. 10, 6, 23; October 6, 1923.

Cross-examination.

By Mr. Davenport:

X Q. 24. Mr. Gorey, the difference between a certificate of deposit and a cashier's check is that a cashier's check is ordinarily drawn on some other bank than in which you have a deposit; and the certificate of deposit you have the funds in your own bank?

A. May I answer that question?

X Q. 25. I asked it of you.

A. A cashier's check is a check on the bank in which that official is employed. A bank draft is what you have just described; a draft drawn on another bank. We use the definition of draft with that difference; one being drawn on an outside bank and the other on a home institution.

X Q. 26. I say, a cashier's check is an order drawn on some other bank.

A. I hear what you say, but I don't agree with you.

X Q. 27. You don't agree with me. That is not usual.

A. For me to agree with you?

X Q. 28. No. Is it usual or unusual, then, for a cashier's check to be a check drawn on some other bank other than the bank—

[fol. 39] A. No; not if you use the word "check." A draft is commonly used as an expression or desire to have a check drawn on another bank. When it is drawn on an outside institution "draft" is the word used.

X Q. 29. The check is signed right there?

A. Yes.

X Q. 30. Yes; that is what I am after. Now, was this on interest or not on interest?

A. According to the terms of the check which you have in your hand, it is not on interest.

X Q. 31. So what you did was to receive this cash or money or whatever it was and issue a certificate of deposit.

so that you kept the funds in your own bank? Kept the funds for this cash?

A. Yes.

Mr. Davenport: That's all, I think, Mr. Gorey.

FRANK C. GOULD (sworn).

By Mr. Malone:

Q. 1. What is your full name, Mr. Gould?

A. Frank C. Gould.

Q. 2. And you, too, live in Silver Lane, East Hartford?

A. Yes, sir.

Q. 3. What is your business, Mr. Gould?

A. Why, farming and pickle business; both.

Q. 4. And which business predominates in your activities?

A. Why, the sale of pickles.

Q. 5. How long have you been engaged in that business?

A. Since 1888.

Q. 6. And the company with which you are associated is known as the Silver Lane Pickle Company?

A. Yes, sir.

Q. 7. Are you its president?

A. Yes.

Q. 8. Were you the founder of the company?

A. Yes.

Q. 9. Who is associated with you now?

Mr. Davenport: How is that material? I object.

Mr. Malone: Well, I am going to show the connection of Mr. Gould with Mr. Simmons, the plaintiff in this case.

Mr. Davenport: I don't see how that is material, may it please the court.

The Court: No.

[fol. 40] Q. 10. Are you acquainted with Mr. Simmons?

A. Yes, sir.

Q. 11. How long have you known him?

A. Why, 18 or 19 years.

Q. 12. How often have you seen him?

A. Why, every day pretty near.

Q. 13. He is a son-in-law of yours, isn't he?

A. Yes.

Q. 14. Now, it appears from the evidence Mr. Gould, that on the 13th of September, 1923, Mr. Simmons entered into a contract with Mr. Swan for the purchase of a pickle business, buildings, equipment, good will and trade at South Deerfield, Massachusetts.

A. Yes.

Q. 15. Which agreement was reduced to writing in the office of Mr. Swan's attorney or attorneys on that date, September 13th.

A. Yes.

Q. 16. 1923. And that by the terms of that agreement made on or before October 1st, 1923, certain things had to be done by both sides to the agreement.

A. Yes.

Q. 17. Among which was the signing of papers and the payment of \$2,500, as appears in Exhibit A.

Mr. Davenport: I pray your Honor's judgment on this kind of a digest of the evidence up to the present. I think he should ask the question.

The Court: Well, go ahead.

Q. 18. Now, whether or not you accompanied Mr. Simmons to South Deerfield and eventually to Greenfield on October 1st, 1923?

A. Yes, I did.

Q. 19. Who else was in the party?

A. Mr. Molumphy—

Q. 20. And Mr. Simmons?

A. And Mr. Simmons; yes.

Q. 21. Mr. Molumphy is of the Silver Lane Pickle Company?

A. Yes; he is one of our organization also.

Q. 22. Where did you first go with Mr. Simmons?

A. Why, as I recollect it, we went to Mr. Swan's office.

Q. 23. Where is that located? What town?

A. In South Deerfield.

Q. 24. And did you find Mr. Swan at home?

A. No.

Q. 25. At about what time in the day did you arrive at Mr. Swan's office?

A. Why, I should judge around ten o'clock. We had to [fol. 41] stop to vote at home and didn't get away as early as sometimes.

Q. 26. Ten o'clock in the forenoon?

A. Yes.

Q. 27. There is evidence here that Mr. Simmons—

Mr. Davenport: Just a moment.

Mr. Malone: All right.

Q. 28. You say that you did not find Mr. Swan at his office.

A. No.

Q. 29. Were you in Mr. Simmons' company?

A. Why, later we went up together, and I think we went to the office together. We were together most of the time.

Q. 30. Was any effort made by Mr. Simmons or by you representing him to locate Mr. Swan?

A. Yes; we went to his house.

Q. 31. How far from the office is the house?

A. Why, a short distance. Across the street past one house, as I remember; possibly two.

Q. 32. Where is Mr. Swan's office located with reference to his pickle factory?

A. Well, it is on the same street only farther east.

Q. 33. Separate building?

A. Oh, yes.

Q. 34. And he lives across the street from the office?

A. Well, he don't live on the same street, but he lives on the other street, but there would be only one or two buildings between. If you go in the back way it would be only a few steps.

Q. 35. Not finding him at his office did you go to his home?

A. Yes, sir.

Q. 36. And did you find him at his home?

A. No, sir.

Q. 37. Were you advised by anyone of the family as to where he was?

A. There was a lady came to the door and we asked if Mr. Swan was home, and she said "No."

Mr. Davenport: I pray your Honor's judgment. I object.

Mr. Malone: I am claiming this, your Honor, for the purpose of showing the effort made by the plaintiff to perform literally the terms of this agreement as set forth in Exhibit A.

The Court: The terms of the exhibit require it to be consummated at the office of Davenport & Fairhurst. I think we don't need to spend much time on this because it is not very material.

[fol. 42] Q. 38. Not finding Mr. Swan at his home, what then did you do?

A. We went up to Greenfield and went to the office of Mr. Davenport and Fairhurst and asked them if they knew where he was.

Q. 39. Before going up to the office of Davenport & Fairhurst whether or not you called at the bank in South Deerfield?

A. Yes, we did.

Q. 40. And what did you do there?

A. I got this check; the cashier's check. I asked for a cashier's check.

Q. 41. Is that [showing] the check that you secured?

A. Well, now, it is awfully hard for me to tell exactly whether it is the check or not—2500—

Q. 42. Certificate of deposit, apparently.

A. I should say it was.

Q. 43. That is the paper you received, anyway?

A. That is my endorsement on the back.

Q. 44. That is the paper you received from Mr. Gorey?

A. I should say it was; yes, sir.

Q. 45. Now, having received that, where did you go with Mr. Simmons? By the way, what time were you at the bank, as near as you can recollect it?

A. It was before noon, I should say. I didn't watch close, but I think we were up at Greenfield before twelve o'clock; or around twelve.

Q. 46. Do you know how far South Deerfield is from Greenfield?

A. No; I don't know exactly, but I should guess it was eight or nine miles.

Q. 47. And you went to the office of Davenport & Fairhurst at Greenfield?

A. Yes.

Q. 48. Who did you see there?

A. Well, I saw this young man; Mr. Fairhurst.

Q. 49. Mr. Fairhurst?

A. Yes.

Q. 50. And was inquiry made there for Mr. Swan?

A. Yes.

Q. 51. And what information, if any, did you obtain?

A. Well, in the first place, he said he didn't know; he thought he would be in; something like that; kind of putting us off.

Q. 52. How long did you wait in the office?

Mr. Davenport: Just a moment. I pray your Honor's judgment. I want that "wanted to put us off" struck out. [fol. 43] The Court: That may be.

Mr. Malone: I want it struck out, too.

Q. 53. Mr. Fairhurst was unable to advise you as to the whereabouts of Mr. Swan?

A. The first time; yes, sir.

Q. 54. And how long did you stay in the office then?

A. Well, I don't remember as we stayed long. We were out and in several times after that.

Q. 55. Inquiring for Mr. Swan?

A. Yes.

Q. 56. And when was the first time that you received any information as to his whereabouts?

A. Well, it was after we had had our lunch, and he said he had telephoned that he would be there about three o'clock.

Q. 57. Who said?

A. This Mr. Fairhurst.

Q. 58. Said that Mr. Swan had telephoned that he would be around after three o'clock?

A. Yes.

Q. 59. And in the meantime did you consult anybody in Greenfield with reference to this situation?

A. Well, you see, the deed—

Mr. Davenport: Just answer it yes or no.

The Witness. Yes.

Q. 60. You had certain things to do—that is, Mr. Simmons did—under this contract?

A. Yes.

Q. 61. Have you any personal knowledge as to who was to prepare the papers; the mortgage deed on real estate and the mortgage on personal property?

A. No; not originally; no.

Q. 62. Do you know whether Mr. Simmons consulted any attorney there?

A. I don't know.

Q. 63. Well, did he in your presence consult some lawyer?

A. You mean, getting out the deed originally?

Q. 64. No; I mean the day you were there on October 1st. Did you go to the office of Mr. Lawler?

A. Yes, we went to the office of Mr. Lawler.

Q. 65. And about what time?

A. He was out at lunch, if I remember, and we came in later and found him.

Q. 66. Mr. Lawler is a practicing attorney at Greenfield?

A. Yes.

[fol. 44] Q. 67. You saw him, you think, some time after lunch?

A. Yes.

Q. 68. Was it after the time you had seen Mr. Lawler that Mr. Simmons was advised by Mr. Fairhurst that Mr. Swan would be in around three o'clock?

A. I think it was, but I wouldn't say positively.

Q. 69. Between the time when you saw Mr. Lawler after lunch and the time you eventually did see Mr. Swan, what did you do with your time?

A. I don't know what we did. We went back and forth. We went into the office several times.

Q. 70. Whose office?

A. Davenport & Fairhurst's office, and inquired several times. I sat around. Didn't have very much to do but wait.

Q. 71. Do you know whether before the arrival of Mr. Swan the papers, the necessary papers, to comply with the terms of Exhibit A, the agreement, had been prepared?

A. I don't know. They were not showed to me or anything said.

Q. 72. Finally whether or not in a body you and your associates went over to Mr. Fairhurst's office?

A. By the way—excuse me; what does Exhibit A refer to?

Q. 73. That is the original contract of September 13th, 1923.

A. The original contract was. I have seen that.

Q. 74. Yes; I know you have seen that.

A. I had seen it before that.

Q. 75. I am asking you now about what time your party went over to Mr. Fairhurst's office in a body accompanied by Mr. Lawler?

A. Well, it was soon after three o'clock, as I remember, because he was supposed to be there.

Q. 76. Who was?

A. Mr. Swan.

Q. 77. Was he there when you arrived?

A. No, sir. I didn't see him there.

Q. 78. About what time did he arrive?

A. He didn't arrive to present himself to us as far as we knew until after five; around six. Perhaps half past five or quarter to six; somewhere around in there.

Q. 79. Do you know of your own knowledge what time the banks close in Greenfield?

A. I do not.

[fol. 45] Mr. Davenport: Just a moment. Well, it's all right.

Mr. Malone: Well, you probably can tell us that, Mr. Davenport.

Mr. Davenport: Perhaps I could.

Mr. Malone: But don't want to!

Q. 80. After Mr. Swan had arrived at the office, which was 5.30 to quarter to six you have estimated, what happened? You were there all the time, I suppose?

A. I was there when he came. He came from another part of the building. I don't know as he came from out doors. It would seem that he had a conference in another room. It would appear so. And then he came in and said he was all ready to do business.

Q. 81. And then what happened?

A. Well, the papers were signed by Mr. Simmons and myself and Mr. Molunphy, and they were offered. And Mr. Swan asked: "Now, these notes", he says, "are demand notes. If I take these notes, I shall demand the money in two minutes."

Q. 82. Who was it that said that?

A. Mr. Swan said that.

Q. 83. He said "Now, these notes are demand notes"?

A. Yes, sir.

Q. 84. Meaning the notes which have been offered here as exhibits—

A. That Mr. Molumphy and I endorsed, as I understand.

Q. 85. Yes. "And if I take these notes I am going to demand them in two minutes." That is what he said?

A. Yes, sir.

Q. 86. Who was present when that was said?

A. I think all of us were.

Q. 87. Was Mr. Swan offered payment of \$2,500 as provided in the contract?

Mr. Davenport: Just a moment. I object to that.

The Court: The form of the question is objectionable.

Q. 88. Whether or not Mr. Swan was offered payment of the \$2,500?

Mr. Davenport: I still object. State what was done.

Q. 89. What was done with reference to the payment of [fol. 46] \$2,500 under the contract?

A. This check, cashier's check, was offered him as payment for the \$2,500.

Q. 90. That is, this paper, whether it be a certificate of deposit or cashier's check, was offered as payment?

A. Yes, sir.

Q. 91. When if at any time, did you endorse it on the back?

A. After it was refused—I endorsed it there at the time, and then it was refused and then I carried it home with me and deposited—I don't remember where it was deposited. As I remember, it went in our regular depositors' list—

Q. 92. It is history afterward. I don't think it is so important. It is made payable to F. C. Gould?

A. Yes.

Q. 93. And the name "F. C. Gould" appears on the back?

A. Yes, sir.

Q. 94. And you signed it there in Mr. Fairhurst's office?

A. Yes, sir.

Q. 95. Was it endorsed before you offered it, or before it was offered to Mr. Swan?

A. I couldn't swear to it, but I was right there if it wasn't. I think it was endorsed right before them all. I think I endorsed it before them all.

Q. 96. And what did Mr. Swan say?

A. He says to Simmons: "Mr. Simmons, is this all you have got?" And he says: "No. If you had rather have a personal check I will give you a personal check."

Q. 97. That is, meaning Simmons' personal check?

A. Yes. And Mr. Swan says—oh, he asked Mr. Fairhurst. He says: "Have I got to take that?" Mr. Fairhurst answers: "You haven't got to, but I wish I could get hold of some of them", or something like that. "Well", he says, "If I haven't got to, I am not going to." He took up his hat and went out.

Q. 98. Do you know whether or not Mr. Swan had executed—assigned—the bill of sale and deed which is provided for in the contract for him so to do? Have you any personal recollection?

A. No, I have no recollection of seeing it done; no.

Q. 99. Your name appears on a note, \$14,907.04, which is Exhibit C.

A. Yes.

[fol. 47] Q. 100. Where did you sign your name on that note?

A. Up there at that same office.

Q. 101. The note being drawn by Mr. Fairhurst?

A. Personally, I don't know who did draw the note. It was passed over to me to sign. I read it over and signed it.

Q. 102. Did you see Mr. Molumphy sign it?

A. Yes.

Q. 103. And Mr. Simmons?

A. Yes.

Mr. Davenport: No dispute.

Q. 104. Well, after Mr. Swan in the manner described took his farewell what did you do and what did Mr. Simmons do?

Mr. Davenport: Just a moment. Mr. Swan had left the room, according to the statement.

Q. 105. Yes.

Mr. Malone: His attorney was still there. Perhaps you were there.

Mr. Davenport: You didn't ask him that.

Mr. Malone: I asked him what he did.

The Witness: I don't remember doing anything except getting up and going home.

Q. 106. You left for Silver Lane, Connecticut?

A. Yes.

Mr. Malone: You may inquire.

Cross-examination:

By Mr. Davenport:

X Q. 107. Mr. Gould, after Mr. Swan said that he should demand or he would demand the money, you and Mr. Molumphy and Mr.—well, the man who made the contract here—and Mr. Lawler retired to another room? Right?

A. Well, as I recollect it, you and Mr. Swan retired, and we did, too, for a few moments. I think we both did.

X Q. 108. You got me into it there, do you?

A. A little bit.

X Q. 109. And when you returned into the room that you say in the presence of Mr. Fairhurst, did someone say in your party that we won't go through with this if you are going to demand the note?

A. Not in my hearing.

X Q. 110. Not in your hearing. Well, we will forget that, then. Now, you signed the paper which was the note?

A. Yes.

[fol. 48] X Q. 111. The other papers were there executed ready for delivery?

A. Yes.

X Q. 112. And someone said in the office "Well, we are ready to pass the papers", did they not?

A. When they came in through they said Mr. Swan has come now and we can do business, or something like that.

X Q. 113. After you had got back into the room and had your conference someone said "We are ready to pass the papers", did they not?

A. They may have. I wouldn't say they didn't.

X Q. 114. And Swan said: "The deed and the bill of sale are ready."

A. He may have, but I don't remember him saying that.

X Q. 115. And the other papers, it was stated they were all ready; and Swan said "I want my money", did he not?

A. Not in my hearing.

X Q. 116. Did Swan say anything about having money?

A. To my recollection he did not—

X Q. 117. Answer the question. Did he or didn't he say anything about having his money; having the money?

A. To my recollection, no.

X Q. 118. Well, you produced at some time some kind of a paper from your pocket and said "I have it right here," didn't you?

A. Yes.

X Q. 119. Wasn't that in reply to his statement "now, I want my money"?

A. It was the inference; whether he said it—

X Q. 120. Well, you understood that was to be the case, didn't you?

A. Yes.

X Q. 121. He said it plain enough so you could understand it?

A. Yes.

X Q. 122. So you put your hand in your pocket and drew out a paper and said: "I have a check here for \$2,500."

A. Passed it right over to him.

X Q. 123. Well, he didn't take it?

A. I think he did. I wouldn't swear to it.

X Q. 124. Then he turned to Mr. Fairhurst and said: "Am I obliged to take a check?"

A. To take "this" or "that"?

X Q. 125. Well, "this" was the check? That is what he [fol. 49] referred to?

A. He called it a piece of paper part of the time, and part of the time a check.

X Q. 126. Oh, he designated it as a piece of paper?

A. No; but you did.

X Q. 127. Well, when he had it there it was the piece of paper that you handed to him?

A. Yes.

X Q. 128. He said: "Am I obliged to take this?"

A. Yes.

X Q. 129. And Mr. Fairhurst said "No"?

A. Yes; he said: "No; you are not obliged to." He said—

X Q. 130. And then Mr. Swan said to the party of the second part here: "Have you anything else?"

A. Yes.

X Q. 131. And he said "My own personal check"?

A. Yes.

X Q. 132. Mr. Swan said: "I want money. I don't want any checks."

A. I don't remember Mr. Swan speaking of the "wanting money," but he may have.

X Q. 133. You don't remember that. You knew before Swan went out that it was money he wanted, didn't you?

A. No; I didn't think it was.

X Q. 134. Didn't think it was money?

A. No.

X Q. 135. Didn't think he knew what he wanted?

Mr. Malone: Answer that.

The Witness: I didn't know what he wanted.

X Q. 136. Well, you knew he didn't want a check, didn't you?

A. He said he didn't.

X Q. 137. And you did not offer him anything else but a check?

A. No; offered him this check.

X Q. 138. Was that [showing] letter dictated by you? I suppose you could tell by looking down in the left-hand corner, couldn't you?

A. I think it was; yes, sir.

X Q. 139. It isn't signed by anybody, but is that [pointing] signature yours?

A. My signature isn't on it; no; but it is one of our letter heads.

X Q. 140. It is your letter, is it? A letter which you caused to be sent to Mr. Swan?

A. I think so.

[Paper so identified and offered was received in evidence, being marked "Defendants Exhibit 1."]

[fol. 50] X Q. 141. "Silver Lane, Connecticut"—

Mr. Malone: Are you offering that now before you put in your case? I think that they should put their case in at the proper time and not in the middle of our case.

The Court: I don't get that. Has this anything to do—

Mr. Davenport: He says there is no objection to it. I am just going to read it to the jury. His objection is that I should keep it in my pocket until I start my case.

The Court: Has it anything to do with your cross-examination?

Mr. Davenport: Yes. Your Honor will see why I am putting it in. This witness testified about being up in South Deerfield that morning. It is offered on that [handing paper to court].

The Court: Well, you may cross-examine on that.

Mr. Davenport: "Silver Lane Pickle Company. E. P. Swan, South Deerfield, Mass. Dear Sir: Replying to your kind favor of recent date. We expect to be at your place Monday, October 1st, but not early in the morning. It is election day here and we want to vote before leaving. We can make arrangements to pay a large proportion of cash providing you can make it an object for us to do so. Presume we can arrange that part satisfactorily. Yours very respectfully, The Silver Lane Pickle Company. FCG E."

X Q. 142. Mr. Gould, when you took that check out of your pocket and, as you say, passed it to Mr. Swan, your endorsement was not on the back of it?

A. It wasn't?

X Q. 143. I say it was not, was it?

A. Why, I think it was.

X Q. 144. Do you recall—

A. But whether or not it was—

X Q. 145. Wait a minute. Do you recall that Mr. Fairhurst asked you to see the check?

A. I don't recall. He may have. I may have handed it to Fairhurst, but I won't say.

X Q. 146. And did you see Mr. Fairhurst make a copy of that check?

A. No.

X Q. 147. Now, will you say whether that check was or [fol. 51] was not endorsed when you passed it to Swan?

A. I won't say whether it was or was not, but I think it was.

Mr. Davenport: That's all.

Redirect examination.

By Mr. Malone:

Q. 148. Well, whether it was or not, were you willing to endorse it?

A. Absolutely. I had the pen right at my finger tips. I had the pen right in my hand when I signed these other papers and was ready.

Q. 149. By the way, what time were the polls opened?

Mr. Davenport: I object to that, because he didn't say anything about that.

The Court: In view of your letter I will admit your question.

Q. 150. I didn't hear your answer, Mr. Gould.

A. They open at different times. I couldn't tell you about that.

Q. 151. Well, I am not going to get much information from you. This was the first of October, 1923. What elections are held in Connecticut on that day?

A. I couldn't tell you that.

Q. 152. Well, you live in a municipality known as a town down there, don't you?

A. Yes.

Q. 153. What kind of town officers do you have?

Mr. Davenport: I object.

Mr. Malone: This is probably to refresh the witness' recollection.

Q. 154. Can you tell me now, having given mature thought to it, what elections were held that you wanted to vote at?

A. No, sir, I cannot. I am sorry to say, but I cannot.

Q. 155. That is a convincing answer. Did you vote that day?

A. Yes; voted when we came along through.

Q. 156. And I think you testified, Mr. Gould, that you arrived with your party in South Deerfield about ten o'clock?

A. About ten.

Q. 157. And it was apparently a late hour—

Mr. Davenport: You have been all over this.

Mr. Malone: All right.

The Witness: All through.

Mr. Malone: I think that's all, Mr. Gould. Thank you.

[fol. 52] RAY C. SIMMONS (recalled).

Redirect examination.

By Mr. Bryant:

Q. 209. Do you know what time the polls open?

A. Yes, sir.

Q. 210. What time?

A. Six o'clock.

Q. 211. What election was it?

A. Town clerk.

Q. 212. Town officers?

A. Town officers.

Q. 213. What time did you vote?

A. Why, we voted about seven. It may have been a few minutes after. They opened at six.

Q. 214. And you left as between—where is the voting place with reference to your home and South Deerfield?

Mr. Davenport: May it please the court, it seems to me we are getting rather far afield.

Q. 215. You pass the polls, do you?

A. Yes, sir.

The Court: You opened the gate.

Mr. Davenport: No, I didn't open it, may it please the court, only to the extent of showing that they were coming up into Massachusetts after they were voting.

Q. 216. In coming up here your regular line of travel would be past the polls?

A. Yes, sir.

Q. 217. And you stopped at the polling place and voted, and arrived about——

A. About ten o'clock.

Q. 218. I will ask you now, in order to bring the connection before the jury in that letter—may I have that letter?

Mr. Davenport: The clerk has it.

Q. 219. "We expect to be at your place Monday, October 1st, but not early in the morning."

Mr. Davenport: Is that in the letter? Is it understood——

Mr. Bryant: That is in the letter.

Q. 220. You described several interviews in your other testimony of calling upon him a number of times. What time did you call upon Mr. Swan prior to the writing of this letter which is dated September 26th?

Mr. Davenport: Now, may it please the court——
[fol. 53] The Court: It is already in.

Mr. Bryant: It is already in, but I want him to repeat that testimony.

The Witness: The three times that I was up there I saw him, and once I didn't see him; and I never was up there later than six o'clock, but I didn't see Mr. Swan until after seven, and therefore I had that letter——

Mr. Davenport: I would just like to know who he voted for for selectman.

The Witness: You may be able to guess. That's telling!

Q. 221. Mr. Simmons, do you happen to know what time the bank closes in South Deerfield?

A. At South Deerfield?

Q. 222. Yes.

A. Three o'clock—why, I don't know what time—I think Mr. Gorey said——

Mr. Davenport: Wait a minute: If you don't know, say so.

The Witness: The vault he said closes at three o'clock. His clock was set on the vault.

THOMAS J. MOLUMPBY (sworn).

By Mr. Malone:

Q. 1. What is your full name?

A. Thomas J. Molumphy.

Q. 2. Where do you live, Mr. Molumphy?

A. I live in East Hartford.

Q. 3. Your business.

A. I am associated with the Silver Lane Pickle Company.

Q. 4. How many years have you been so associated?

A. Sixteen years.

Q. 5. Are you an officer of the Silver Lane Pickle Company.

A. No.

Q. 6. It is a corporation, it has been testified to here.

A. Yes.

Q. 7. Are you a stockholder of the corporation?

A. Yes, sir.

Q. 8. Were you in South Deerfield and Greenfield, Massachusetts, on October 1st, 1923, with Mr. Simmons and Mr. Gould?

A. Yes.

Q. 9. What time would you say you arrived in South [fol. 54] Deerfield? Did you go in company with Mr. Simmons and Gould?

A. No. I got up there at about two o'clock.

Q. 10. Did they precede you or go after you?

A. They preceded me.

Q. 11. To go to Greenfield as you go from Connecticut do you go through South Deerfield usually?

A. Yes, sir.

Q. 12. I see. Were you down at the office of Davenport & Fairhurst with Messrs. Simmons and Gould?

A. Yes, sir.

Q. 13. Where did you first meet Mr. Simmons and Mr. Gould in Greenfield?

A. I met them in the office of Mr. Davenport and Fairhurst.

Q. 14. They were there when you arrived?

A. Yes, sir.

Q. 15. What time did you arrive at the office?

A. About three o'clock.

Q. 16. Was Mr. Swan there at that time?

A. No, sir.

Q. 17. Did you become advised from Mr. Fairhurst or anyone else as to when he was expected, if at all?

A. I was advised that he was expected in soon.

Q. 18. About what time did he arrive?

A. I should say half past five or a quarter to six.

Q. 19. Alone?

A. Alone.

Q. 20. Now, it appears from the contract, Exhibit A, that you were obliged to sign as a joint maker on a note.

A. Yes.

Q. 21. Do you recall having done so?

A. Yes.

Q. 22. I wish you would tell in your own words what conversation you heard, if any, between Mr. Swan and Mr. Simmons or Mr. Gould relative to the payment of \$2,500.

A. When Mr. Swan came into the office we all went into Mr. Fairhurst's private office; Mr. Swan, Mr. Gould, Mr. Simmons, Mr. Fairhurst and myself. Mr. Swan sat down at the table and we offered him the notes and the cashier's check. And Mr. Swan says: "You understand when I get these notes I shall demand payment in two minutes." We had some discussion trying to persuade Mr. Swan that he was perhaps unreasonable, but we finally decided to give him our notes, which we offered him, and the cashier's check. When Mr. Swan got the cashier's check he asked us if that [fol. 55] was all we had. And Mr. Simmons asked him if he would rather have his personal check. And he looked to Mr. Fairhurst and asked him if he was bound to accept it. And eventually he refused it and walked out of the room.

Q. 23. And did you see him any more that day?

A. No.

Q. 24. Did you see the so-called cashier's check or certificate of deposit yourself?

A. I saw it, but I didn't examine it; I saw it offered.

Q. 25. You saw it offered by whom?

A. Mr. Gould.

Q. 26. And heard him ask the question of his counsel—or, rather, of Mr. Simmons and Mr. Gould, "Is that all that you have got?"

A. Yes.

Q. 27. And turned to his attorney and ask: "Have I got to take that?"

A. Yes.

Q. 28. And eventually got up and walked out?

A. Got up and walked out.

Q. 29. How many years have you known Mr. Swan, the defendant?

A. Why, I have known Mr. Swan for four or five years.

Q. 30. Preceding the time that you saw him, October 1st, 1923, how many times would you say you have met him at his place of business at South Deerfield?

A. Perhaps half a dozen times.

Q. 31. His business rather parallels the Silver Lane pickle business?

A. Yes, sir. He is in the pickle business.

Q. 32. So you were acquainted with him and he with you?

A. Yes.

Q. 33. Do you know whether he was also personally acquainted with Mr. Simmons?

A. Yes, I do know that he was.

Q. 34. You have been with Mr. Simmons at the Swan pickle plant together?

A. Yes, sir.

Q. 35. More than—several times?

A. Several times.

Q. 36. So that when Mr. Swan came into the room at Davenport & Fairhurst's offices you knew him?

A. Yes.

Q. 37. And he knew you?

A. Yes.

Q. 38. Do you know personally whether he was acquainted with Mr. Gould?

A. I think he was.

Mr. Davenport: I ask that to be struck out. It isn't responsive.

[fol. 56] The Court: It may be.

Cross-examination.

By Mr. Davenport:

X Q. 39. Did you go by automobile from your place in Connecticut to Greenfield—

A. Yes.

X Q. 40. Or did you go by train?

A. I went by automobile.

X Q. 41. What time did you leave Connecticut, do you know?

A. Oh, probably one o'clock.

X Q. 42. And how far is Connecticut south of Springfield—not Connecticut, but how far is the place where you live south of Springfield?

A. Twenty-seven miles.

X Q. 43. Twenty-seven miles?

A. Yes, sir.

X Q. 44. And it is forty miles from Springfield to Greenfield. Do you know that, or don't you know that?

A. I don't know. I am not very familiar with the mileage.

X Q. 45. Well, it is twenty-seven miles south of here?

A. Yes.

X Q. 46. Now, you have stated that you arrived at Greenfield about two o'clock and you went to the office of Davenport & Fairhurst.

A. No, not two; three.

X Q. 47. Oh, three. I understood you to say two.

A. No.

X Q. 48. Pardon me. Then you had not prior to three o'clock on the afternoon of the first of October signed this note?

A. No.

X Q. 49. You came to Greenfield for the purpose of signing the note?

A. Yes.

X Q. 50. And you arrived there at three o'clock?

A. Yes, sir.

X Q. 51. Or a little after?

A. Yes.

X Q. 52. Now, you, Mr. Simmons and Mr. Gould, Mr. Lawler and Mr. Swan and Mr. Fairhurst had considerable discussion there in the private office, did you not?

A. Yes.

X Q. 53. How long should you say that discussion continued in hours or minutes?

A. Oh, perhaps an hour or more.

X Q. 54. An hour or more. It was the backing and filling preparatory to the delivering of the papers?

A. Yes, sir.

X Q. 55. Then the time came when the papers were ready to deliver?

A. The papers had always been ready.

X Q. 56. Well, take the bill of sale. Do you recall [fol. 57] whether there was something added to the bill of sale at the request of Mr. Simmons?

A. No; I don't remember that.

X Q. 57. So there came a time when everything was ready to pass the papers?

A. Yes.

X Q. 58. And at that time did Mr. Swan say anything about the \$2,500?

A. He didn't have to. We offered him the cashier check for the \$2,500.

X Q. 59. Did he say anything about money?

A. No.

X Q. 60. Not at all?

A. No.

X Q. 61. Didn't he say that he wanted money?

A. Not in my hearing.

X Q. 62. You were there all the time?

A. Yes.

X Q. 63. A party to the transaction?

A. Yes, sir.

X Q. 64. You don't recall, or do you say that he did not say—

A. I don't recall.

X Q. 65. But he refused to take a check?

A. Yes.

X Q. 66. And said he wanted money?

A. Not in my hearing.

X Q. 67. Not in your hearing?

A. No.

X Q. 68. Your hearing was good wasn't it?

A. Yes.

X Q. 69. Did Mr. Swan say this: "Here are the papers. I am ready to deliver." And did someone in your party say: "We are ready to take them, and here are our papers."

A. I didn't hear Mr. Swan make a statement like that.

X Q. 70. Well, was that in substance what he said?

A. It may not have been the exact words. No; I didn't hear him make a statement like that.

X Q. 71. Didn't hear him make a statement like that?

A. No.

Mr. Davenport: All right. That's all.

Redirect examination.

By Mr. Malone:

Q. 72. I don't recall whether you have answered this question or not. What time in your recollection did Mr. Swan arrive at the office of Davenport & Fairhurst?

A. I should say it was between half past five and a quarter of six in the afternoon.

Q. 73. Of this day?

A. Yes; on October 1st.

Mr. Malone: That's all.

[fol. 58] FRANK J. LAWLER (SWORN).

By Mr. Malone:

Q. 1. What is your full name, Mr. Lawler?

A. Frank J. Lawler.

Q. 2. A practicing lawyer of Greenfield?

A. I am.

Q. 3. How many years have you been such, Mr. Lawler?

A. Thirty years.

Q. 4. Probably during that length of time you have had occasion to make deposits in the bank up there?

A. Yes.

Q. 5. How many banks are there in Greenfield?

A. Well, there are two. There is the First National and the Trust Company--

Mr. Davenport: I pray your Honor's judgment. I don't see how it makes any difference how many banks there are in Greenfield.

The Court: I think we can take it that the banks in Greenfield close at three o'clock.

The Witness: Excepting on Saturdays in Greenfield, when they close at 12.30.

Q. 6. You were first consulted, it has been testified here, October 1st, 1923.

A. I was.

Q. 7. Do you remember what time of day you first saw the plaintiff and his associates?

A. As I recall it, it was shortly before three o'clock.

Q. 8. Were they all in your office; that is, Messrs. Gould, Molumphy and Simmons?

A. As I recall it, they were.

Q. 9. Do you recollect whether or not all or any of them went out of your office to Mr. Fairhurst's office to see if Mr. Swan had arrived?

A. They did.

Q. 10. And whether or not he had arrived at the time they went over there?

A. They reported he had not.

Q. 11. Did you in company go over to Mr. Fairhurst's office?

A. I did.

Q. 12. About what time of day?

A. It was about three o'clock.

Q. 13. Had he arrived then?

A. He had not.

Q. 14. What time did he arrive, Mr. Lawler?

A. It was quarter to six by my watch.

[fol. 59] Q. 15. And do you remember who drafted the various papers that were to be exchanged in this transaction?

A. The papers, as I recall it, were all prepared at Davenport & Fairhurst's office.

Q. 16. And do you remember whether they were prepared before or after Mr. Swan's arrival?

A. As I recall, some of them were prepared before. There was one paper especially that I recall which was a note for something over \$14,000 for pickles and there was some controversy between them in relation to the number of pickles. And finally it was arranged upon, and a part of the note had been written on the typewriter. And after they had agreed upon the amount, Mr. Fairhurst wrote in the amount in longhand.

Q. 17. You were interested in seeing that the title to this real estate was clear?

A. Yes.

Q. 18. Did you have some discussion, as counsel for Mr. Simmons, with Mr. Fairhurst as counsel for Mr. Swan about the title?

A. I did, after having gone through the registry of deeds.

Q. 19. Was Mr. Swan present at the time?

A. He was not.

Q. 20. Well, did you clear that matter up?

A. As I recall it, there was an undischarged attachment which I called to Mr. Fairhurst's attention and which he assured me would be discharged. And knowing him as I knew him I was satisfied that it would be done.

Q. 21. Well, we don't question that, either. So that it was just quarter to six when Mr. Swan arrived?

A. Yes; about that.

Q. 22. How long did he remain in the office before his withdrawal, would you say?

A. I think it was about seven o'clock when he went away.

Q. 23. And when he went, Mr. Fairhurst was there as well as yourself—

A. Yes.

Q. 24. With the men from Connecticut?

A. We were.

Q. 25. Was Mr. Davenport there?

A. Mr. Davenport was not there but a very little time. He was in and out. He was there but a few minutes and then he would go back into his private office.

Q. 26. Do you recall the time when Mr. Swan was offered [fol. 60] this certificate of deposit or cashier's check, or whatever it may be, having funds at the Produce National Bank at South Deerfield?

A. I do.

Q. 27. Tell us what you recall in connection with that transaction [showing witness check].

A. Well, do you want just the conversation in relation to this matter, or all the conversation that I recall that took place after Mr. Swan came in?

Q. 28. Well, the conversation with reference to the \$2,500 certificate of deposit.

A. After the papers were all prepared and ready for delivery the suggestion was made that the parties were all ready for the delivery of the papers; and they were all gotten together, and Mr. Gould took this check out of his pocket and said "Here is the \$2,500," and passed it over and, as I recall it, at some time Mr. Swan had the check in his hands and looked at it. And as he looked at it he said to Mr. Fairhurst: "Have I got to take this check in payment?" And Mr. Fairhurst sort of laughed and said: "Well, I don't know as you have got to take it; I would like to get several just like it," or words to that effect. Mr. Swan then said: "Well, if I haven't got to take it I am not going to take it; and I will simply say good night, gentlemen." And he got up and took his hat and coat and walked out.

Q. 29. At the time of this occurrence, as I understand it, these various papers offered as stated by the plaintiff here were already signed?

A. Yes.

Q. 30. In the condition in which they are now?

A. Yes.

Mr. Malone: You may inquire.

Cross-examination.

By Mr. Davenport:

X Q. 31. Did you see the contract, Mr. Lawler?

A. I did.

X Q. 32. What time of day did you see that?

A. I think I saw the contract at my office after they came in.

X Q. 33. So it was somewhere around two to half past?

A. It was somewhat after two.

X Q. 34. You read it over.

A. I did.

X Q. 35. Now, after Mr. Swan asked Mr. Fairhurst if he [fol. 61] had got to take that check did you hear Mr. Simmons say anything about his giving his check?

A. Somebody asked—I don't know whether it was Mr. Simmons or Mr. Gould—wanted to know if they wanted his personal check.

X Q. 36. And what did Swan say?

A. And Swan said: "No; I want the cash."

Mr. Davenport: That's all.

Mr. Malone: That's all.

RAY C. SIMMONS (recalled).

Redirect examination.

By Mr. Bryant:

Q. 233. I wish, Mr. Simmons, to call your attention again to Plaintiff's Exhibit C, which is a note for \$14,-905.04; and call your attention to the fact that the amount of the note is written in longhand instead of being type-written; and I want to ask why and when that was written in—or, rather, when and why it was written in?

A. Why, it was written in that night. Of course, it was on real estate and all the rest of it, and it was a question of just what it was, but on that other we were to figure up on the slips, and, of course—

Q. 224. Not quite so fast so the jury can understand. You were to figure up on the slips.

A. We were to figure up on the slips, but it wasn't definitely decided just the amount of pickles there was there that night. Therefore they didn't know until we decided—

Q. 225. Who do you mean by "we"?

A. Mr. Swan and myself. —just the amount of the pickles there was.

Q. 226. Just how many thousand there were?

A. Yes; just how many thousand. Therefore when we decided upon a certain amount agreeable to us both Mr. Fairhurst wrote that in himself in our presence.

Q. 227. And when was that done?

A. That was done about seven o'clock; just before the papers had gone through.

COLLOQUY BETWEEN COURT AND COUNSEL.

Mr. Bryant: That's all, Mr. Simmons.

The Court: You reserve the right to introduce evidence on the question of damages, Mr. Bryant?

[fol. 62] Mr. Bryant: Yes, your Honor.

The Court: Then, gentlemen, why don't I excuse the jury and I will hear you. You are going to present a motion for a directed verdict, and I will call the jury back when we are ready for them. So the jury may be excused subject to call. [Jury leaves the room.] In view of the way this case has been presented I think I can properly consider your motion addressed to me at this time. That is, upon the present state of the plaintiff's case——

Mr. Davenport: Yes.

The Court: The plaintiff having stated that he has no further evidence on the question of performance by the plaintiff, and that if on the present state of the evidence the defendant was not required to accept the certificate of deposit there should be a verdict for the defendant directed. If, on the other hand, the defendant could not lawfully insist upon a legal tender, or cash as distinguished from the certificate of deposit, then the case would be submitted to the jury upon the question of damages, and further evidence will be received on that issue of fact from both plaintiff and defendant. I think that leaves the record all right. Now, gentlemen, have you any Massachusetts cases that settle this question of law?

Mr. Davenport: Of course, your Honor would not preclude us from raising the same question at the end of the case?

The Court: Oh, no. If you have some cases, I would like to look at them.

[At this point and later in the proceedings the following citations were presented to the court by counsel for defendant:]

- (Hallowell Bank v. Howard, 13 Mass., 234.
- Sargent v. Southgate, 5 Pick., 311.
- Julliard v. Greenman, 110 U. S., 204.
- Morrell v. Brown, 15 Pick., 173.
- Snow v. Perry, 9 Pick., 539.
- Phillips v. Blake, 1 Met., 156 (56).
- Ansin v. Ins. Company, 241 Mass., 107.
- Pearlstein v. Novitch, 239 Mass., 228.)

[fol. 63] Mr. Fairhurst: The case 13 Mass., Hallowell against Howard.

The Court: I have got the case of Snow against Perry, which says that bank notes are considered good tender unless objection is made on that account.

Mr. Fairhurst: 5 Pickering, 319. 15 Pickering, 173, 175; and your Honor has the Snow case and one of Metcalf.

The Court: The plaintiffs do not contend, do they, that this is legal tender?

Mr. Bryant: Oh, no.

The Court: There is no question about that.

Mr. Fairhurst: 110 Mass., page 204. Julliard, 421.

The Court: Have you any citations, Mr. Bryant?

Mr. Bryant, 183, Tuttle against Larkin, Mass., page 389. My associate here has a number of cases which touch upon the issues. I would like to show your Honor a case of 26 Connecticut, which is the leading case on that subject, page 119. The court discusses the question there, and that case is the leading case on the doctrine that is raised, where I have marked on the right-hand page; the opinion of the court in determining what tender is. That exact language was decided as late as 7th Illinois; tender of performance.

The Court: If the defendant was not obliged to accept as part payment for the purchase price this certificate of deposit, how can it be said that you were able and willing to perform on the day in question? Was that the last day under the contract?

Mr. Bryant: That was the last day under the contract, and the man kept away from the place of business until 5 o'clock in the afternoon, not having determined the amount that we were to pay him.

The Court: It is perfectly obvious that he was trying to get out from under the contract. However, if he was working under his legal rights—

Mr. Bryant: If your Honor please, he accepted our check in the course of business. I can give your Honor a case right in point. Now, he kept away knowing that we could [fol. 64] not make him any tender of any kind. The banks would be closed and everything would be closed.

The Court: Just what did he turn into the bank?

Mr. Bryant: He turned the check into the bank and bought a certificate of deposit. They knew our rating. We had to give them a note for a good many thousand dollars. Nobody knew how many thousands.

The Court: Nobody had any reason to believe that anybody would make an unreasonable demand.

Mr. Fairhurst: This business of figuring has nothing to do with the \$2,500. This figuring that my brother is speaking of is the figuring for the basis of the note.

The Court: And your man was pretty careful to keep away until the banks were closed.

Mr. Davenport: We might be able to go into that later on.

The Court: Perhaps he had a right to do it, as a matter of law.

Mr. Bryant: It is specifically stated in their contract that time is the essence of this contract.

The Court: But he had all day.

Mr. Bryant: It is during business hours, of course.

Mr. Fairhurst: If your Honor please, they had from the 13th of September to the first of October, and they waited until the last moment. They waited until the very last minute.

The Court: That would have given them ample time to sign a note. But it seems to me that the whole question is, whether under a contract of this kind the defendant has a right to refuse a certificate of deposit. You might grant that his conduct was unreasonable and that you had no ground for thinking that he would take this attitude, but if he was still within his rights, why, you can't recover.

Mr. Bryant: The course of business between the parties was such as to preclude a creditor from objecting to a check when objection is not made in sufficient time before payment in which to give the debtor an opportunity to substitute legal money.

The Court: But he didn't know in what form the payment was to come until about six o'clock.

[fol. 65] Mr. Bryant: The performance as specified in that contract—there should be performance if we tendered the payments at the office of these lawyers. We went there at two o'clock in the afternoon prepared to make a tender, and Mr. Swan was not there to determine how much we were to tender, and we had to wait until he came there before we could make any tender. We could have gone there and taken those pickles and carried them away. It wasn't a tender of only a single thing; it was a tender of performance.

The Court: You left it to the last day.

Mr. Fairhurst: Suppose Mr. Swan didn't come at all. Suppose he had left the papers at my office in accordance with the contract and at three o'clock these men came into the office. The same question might be raised. Should I or could I take that check and bind Mr. Swan? The thing is simple, of course. There was something they had to do. They had to figure out the amount of the note. But the principle is just the same. Now, I think that is fundamental; that is elementary. If the contract does not provide for payment in a certain way, then it is a matter of legal tender. I would have been afraid—of course, knowing what I knew of the situation I don't know whether I would have been criticised for taking that check. They left at seven o'clock and there was ample time then.

Mr. Bryant: To get gold? I would like to know where!

Mr. Fairhurst: You could get money.

Mr. Bryant: Or where we could get money. If the only thing we had to do was to pay \$2,500, it would have been our duty to pay it, but we had a great deal more than that. We had to sign notes. We had to do a great deal more than that.

The Court: That was done, so all we have here to consider is the payment of the money. He claims you didn't tender him \$2,500; it isn't a sufficient tender. If it wasn't a sufficient tender he is not liable. If it was a sufficient tender then he is. It is considered a good tender unless objection was made—I think we would have to find here that it was a certificate of deposit. In my opinion it was not as good as a cashier's check. You see the difference [fol. 66] between a check and legal tender is that the bank upon which the certificate of deposit was drawn might be in the hands of a receiver. He might never collect, and he would be out of cash. That is why the courts say that a man who is entitled to money is entitled to legal tender.

Mr. Bryant: The certificate of deposit was as good as cash, of course.

The Court: It happened to be. There were no grounds to think that it wasn't. I agree that his attitude was entirely unreasonable and taken by a man who wanted to escape his honest obligations, but if he kept within his rights I don't know what you can do about it.

Mr. Bryant: Is it proper to isolate a single solitary thing and say that we haven't performed that contract when we had all these other things to perform and when we were ready and able and willing to perform.

The Court: You were able to perform it to the letter, but not within the time stipulated. And if you were not able to do it within the time stipulated, it is because you left performance to the last minute. You took your chances on that.

Mr. Bryant: But we didn't leave it to the last minute, if your Honor please. We went there at two o'clock in the afternoon. Abundant time.

The Court: And you say that his failure to show up excuses you from tendering anything other than the certificate of deposit?

Mr. Bryant: The course of business between us was certainly that. He recites in his contract we should pay him \$500. There are some checks and personal checks, and there are some negotiations about the other things, and he asks us to send him a check for those other things.

The Court: When you are discussing that letter, I wouldn't think that the suggestion of taking a check instead of a note—I wouldn't think that it would indicate his willingness to take a check instead of cash. Quite a different proposition. Of course, the usual course of business between parties in a case of this kind is not to give a note but a check. And they gave a check that no reasonable man would question.

Mr. Bryant: Look at the contract and the language of the contract. We are not called upon to pay cash.

The Court: Well, it called for money payment rather than merchandise.

Mr. Bryant: We are called upon to pay dollars. You might say that he had given notes, and those are not dollars. We might have taken bills—

The Court: But those bills would have been legal tender.

Mr. Bryant: He takes our check for \$500. He leads us to suppose that's all he wants, and he doesn't give us any different notice, and he keeps away until we can't get anything else. He keeps away. The law that I quoted holds that he cannot object to it unless he gives us such notice as will enable us to get legal tender. We were there early, and he doesn't give us the notice that the law requires.

The Court: What case do you cite in support of that proposition you just made?

Mr. Bryant: Seventy-seventh Maryland, 57th Washington, 36 Lawyers' Reports annotated.

The Court: Is that [pointing to paper] typewritten? Let me read it, please.

Mr. Bryant: That was typewritten by a gentleman in my office.

The Court [Sending for citations noted]: It may be that the defendant who was responsible for the predicament in which you were placed by his own acts rendered it impossible for you to meet his unusual, extraordinary demands, and having given you no notice or reasonable opportunity to comply, he is now in no position to take advantage of his own misconduct in that way. This Massachusetts case that you cite has to do with the tender of money. That has nothing to do with this case. The money was tendered. "Ordinarily a check is not sufficient to constitute a valid tender", and, again in the following cases this rule was applied to certified checks. "That objection is not made in [fol. 68] sufficient time before payment in which to give the debtor an opportunity to substitute legal money for a check, which precludes"—

Mr. Davenport: I am frank to confess in that case which he speaks of—I am frank to confess that I can't find anything in Massachusetts that a man can tender anything other than legal tender and excuse himself if he had an opportunity to get something else. Of course, your Honor is familiar with that general case where the receipt of a check does not constitute payment unless it is received. In other words, I am not bound to take a check. If the rule is applicable to a bank, it surely is applicable to an individual. You can't ignore the rules of legal tender and say: "Why, you never said anything about it." The time to say something about it is to provide for it in the contract; and if the plaintiffs do not choose to provide for it in the contract it seems to me they can't say that dollars or money meant something other than that. It seems to me you are undermining the whole thing if there was a rule of that sort which allowed somebody at the last minute to come in and say: "I don't care what the contract provides. Here is my check." And the fellow would have to take it or a bank check at that

time or possibly postpone the matter for twenty-four hours more.

The Court: Here are parties to the contract who are willing and ready and able to perform, say, as early as two o'clock on the last day. And the other party of the contract by his own conduct makes it impossible for them to perform.

Mr. Bryant: They did make it impossible to perform because we couldn't go to the bank and get the money. It wouldn't do us any good because we couldn't give the note, and we had to do all these things.

The Court: You could have had the money in your pocket. Nothing that the defendant did prevent your getting \$2,500 in gold or \$2,500 in legal tender notes.

Mr. Bryant: Oh, yes; that is quite true.

Mr. Fairhurst: And you and the other parties would never have been here if they had \$2,500 in currency. It is a matter of that \$2,500; that's all.

[fol. 69] Mr. Bryant: Currency isn't legal tender.

Mr. Fairhurst: Oh, yes, it is.

The Court: There are a lot of United States Treasury notes that are. Of course, if you had had cash in 100 dollar bills you would have to take that, I should think.

Mr. Fairhurst: Absolutely, absolutely.

The Court: Although being strictly technical, perhaps some of those bills might not have been legal tender. But the certificate of deposit is not legal tender. If you owe \$100, I am not obliged to take a certificate of deposit in payment. I am clear on that point. The only question in my mind is whether your client is in any position to raise an objection in view of his own conduct. We deal here with acts of parties whose rights and obligations have been fixed by a formal agreement. Both parties have got to act in good faith. At the same time, I am afraid that a complete answer to the question which I put to you is that no act of the defendant rendered it impossible to provide money.

Mr. Fairhurst: That is just the point; and I think that is just the difference.

The Court: The course of dealings between them: The first payment had been made by check, and everybody knows that a payment of this kind would have been made by a certified check or some such paper as was presented. As a ten-

sonable man he could not ask for anything better. Of course, in the ordinary course of business I have no sympathy with technicalities of this kind. We have to enforce laws as we find them and not as we would like them to be. I am surprised that you can't show me a case right in point. I thought that this case had probably been settled.

Mr. Bryant: I didn't find a case in Massachusetts nor any other State, because they are on the fundamental doctrine of law; the performance of the contract.

The Court: Substantial performance.

Mr. Bryant: There is no case in Massachusetts nor any other State.

Mr. Davenport: I think there is no case that went up because it seems so perfectly obvious as a rule of law that a [fol. 70] party who had to pay a sum of money unless his contract provided otherwise has to tender what our Federal Congress has declared to be legal tender. And I couldn't conceive of somebody raising the question that a check was partial performance or substantial performance in any way. I suppose that is the reason why the case has not gone up.

Mr. Bryant: The Connecticut Supreme Court established this doctrine on the question of substantial performance and the other courts have followed that decision until it has become the leading case and nobody has seen fit to question it.

The Court: Can you call it substantial performance when you offer something which the seller is not obliged to take?

Mr. Bryant: Commercial transactions are not now as they were perhaps fifty years ago, and all our business is done by checks. Ninety-nine per cent of it is done by checks, and if they do not want their contract carried out in the ordinary way in which contracts are carried out, it is up to them to give a reasonable notice when we come ready to perform our part. We came ready to perform our part, and if they were not ready to accept it, it was up to them to inform us.

Mr. Fairhurst: We didn't know until that night.

The Court: It is barely possible that your client knew that he was going to exact it before that night.

Mr. Fairhurst: I don't know, of course, about that. The letter reads "early in the morning." The client got in late. He left personally about the same time that Molumphy left Connecticut to go back. In other words, he expected that that deal was going through in the afternoon. Your Honor

has only heard one side of the case. It is not agreed that our man came there necessarily at half past five. There is another side to the story when he got there, and there are other reasons that your Honor has not heard.

The Court: I rather imagined so.

Mr. Davenport: It is coming to that simple matter of law at this time, but there is absolutely nothing that this man did to hinder or make it impossible for him to perform. They [fol. 71] could have made him perform or held actionable for damages. They consulted counsel at two o'clock who went over the contract before the banks closed.

The Court: You will agree that no one would want anything better than a certificate of deposit on the Produce National Bank. There is another reason why I should prefer to submit this case to a jury to hear the witnesses: Of course, if I should make a mistake and direct a verdict for the defendant now, upon reversal we would have to go all over it again; whereas, if I am overruled, why that settles it.

Mr. Davenport: We haven't gone a great ways, your Honor, and it would be better to have it go up on a clean-cut issue.

The Court: It would go up just the same.

Mr. Davenport: I know, but it would take another day to try it.

The Court: Well, we can have another day. I think there is another one coming. Well, I must say I am finding difficulty in getting away from my first views on the subject; namely, that this defendant was not required by the contract to take the certificate of deposit; and if he was not, then there was a failure of tender—even substantial performance. Here are the cases: "Bank notes are not tender and a party is not even required to take a certified check if he objects to it on the ground that it was a certified check." If that is so, why was this man obliged to take a certificate of deposit? I can't escape the conclusion that he was not obliged to take it.

Mr. Malone: Would your Honor permit a suggestion from me? I think, if your Honor please, there is something to be said that he had certain inherent rights as a matter of law. We have had that matter discussed in the case of 57 Washington—in Maryland—the citations being here—in which the court has held that the course of business between the parties is not such as to preclude a creditor from objecting to the tender of a check in payment where such objection

was not made in sufficient time before the payment was due in which to give the creditor an opportunity to substitute [fol. 72] legal tender for the check. And I suppose that one can be so immersed with his own ideas on the subject as to be wrong; but we think that the law necessitates Mr. Swan should have accepted our checks, he having accepted our check for \$500 and acknowledged it, and he having written—be that important or not as your Honor may view it—"I would like a check in full for all amounts to substitute," we were entitled to believe that our check would be acceptable. We think we went a little bit better by getting a check from a substantial bank in his own home state.

The Court: You thought he was required to accept a certificate of deposit?

Mr. Malone: What would be more satisfactory than to give him a check on his own bank? It would have been just as simple for us if we had anticipated his claim to go to his own bank in South Deerfield and take \$2,500 in money as to take this certificate and bring it up.

The Court: Exactly.

Mr. Malone: And it is to be assumed that if these men being hard-headed business men had anticipated Mr. Swan's claim that he wanted to call under the Constitution, we would have brought that. And therefore we claim that the law requires Mr. Swan to give us a notice that he wants something other than the kind of check he has been receiving up to that time.

The Court: You did not intimate to him what he was going to get until the eleventh hour.

Mr. Malone: We had a right to assume that he expected us to give him a check, and I can't free myself from the belief, although none of us were there present, that it was intended as a subterfuge and evasive method to get out of an honest agreement. I suppose that the courts of law look askance at that sort of thing, and it is the duty of the courts to do justice if they can. And under those decisions the court can in view of those circumstances—

The Court: You think that I should say that the plaintiff tendered substantial performance so far as it failed to deliberately perform, that it was the fault of the defendant [fol. 73] more than the plaintiff, or the failure of the defendant to do something which he ought to have done;

namely, to notify you before the last day that you must come prepared with legal tender?

Mr. Malone: I think it was his duty to offset the fair implication that we got from previous transactions that he would accept the type of tender that we had previously given him.

The Court: And supposing I agree with you that it was a subterfuge, and yet that he had a right to reject the certificate of deposit, how does that leave you any better off?

Mr. Malone: Why, I suppose—this is not a court of equity—

The Court: That is the trouble.

Mr. Malone: But, nevertheless, courts of law are promulgated and held for the purpose of justice, and, of course, their action and conduct is based very largely on precedent. Certainly we shouldn't be charged with any misdemeanor when trying to give him a check in South Deerfield. We are not to be criticised for doing it. At the same time I want to emphasize that so far as that note goes the evidence is today, other than the bringing in to Mr. Fairhurst's office of admitted legal tender under the United States laws, our people did everything that the law required them to do, and we claim they are excused.

The Court: Isn't that just the question?

Mr. Malone: Yes, that is the question; but we claim, your Honor, that due to the relations between the parties they had no right to assume in the absence of any notice that any other type of performance was to be required of them.

The Court: In other words, in view of the situation as it existed the performance which you tendered was all the contract required?

Mr. Malone: Yes, your Honor. It doesn't say anywhere in this contract that we are supposed to bring cash, money or legal tender. It simply says "2,500." It uses the term "dollars" with reference to the 500. I think, your Honor, that this contract is mighty well drawn. It is a better job than I could have done under the circumstances.

[fol. 74] The Court: You are reading the last part of it. I notice the phraseology of the last part where it says what shall constitute performance.

Mr. Malone: "Tender of performance on the part of the party of the first part shall be sufficient if on said date a deed and bill of sale, in accordance with the provisions hereof, if left with said Davenport & Fairhurst for delivery to the party of the second part; and tender of performance shall be sufficient on the party of the second part if on said date the sum of twenty-five hundred dollars"—not necessarily money or cash—"plus suitable notes and mortgages, are left with said Davenport & Fairhurst for delivery to the party of the first part."

The Court: "The sum of twenty-five hundred dollars."

Mr. Bryant: Plus notes and other things.

The Court: Which amount to money as distinguished from property or merchandise.

Mr. Malone: Just the same as a check would mean money; just the same as our certificate of deposit at the South Deerfield bank meant money. Now, in conclusion your Honor, I don't think that we can separate one act that this plaintiff had with all things. It was a transaction embodying a number of important actions on his part, and which must be performed. There was the deed, the mortgage on the real estate, the mortgage on the personal property, the note, the amount of which could not be ascertained without the presence of Mr. Swan as well as the payment of \$2,500. Now, I don't agree with Mr. Fairhurst. I think if Mr. Fairhurst understood as the attorney for Mr. Swan and for the other people that Mr. Swan wanted money he would have said \$2,500 in cash, and that would have made an end of the thing. He would have had it. So we claim that he should have taken a check or its equivalent.

The Court: Well, I suppose I have got to decide it. I am inclined to think that with that certificate of deposit in his possession that a jury could very well find—I don't know but I had better leave it to them—that the plaintiff was ready and willing and able to perform substantially his part [fol. 75] of the contract. I guess we will go ahead with the case and I will overrule the motion.

Mr. Davenport: Your Honor will save our exceptions.

[Jury recalled.]

PATRICK M. TUOMEY (SWORN).

By Mr. Bryant:

Q. 1. What is your name?

A. Patrick M. Tuomey.

Q. 2. Where do you live, Mr. Tuomey?

A. Greenfield.

Q. 3. What State?

A. Massachusetts.

Q. 4. What is your business?

A. Building and contractor.

Q. 5. Are you familiar with Deerfield?

A. I am.

Q. 6. Did you ever live there?

A. Yes.

Q. 7. How long?

A. About twelve years.

Q. 8. I didn't hear you.

A. About twelve years.

Q. 9. And when did you move away from there?

A. 1918.

Q. 10. And what was your business in Deerfield?

A. Five years I was in the same business; building contractor.

Q. 11. You are familiar with the Swan pickle factory there?

A. I am.

Q. 12. Have you examined the buildings on that land?

A. I did.

Q. 13. When?

A. November, '24.

Q. 14. What year?

A. 1924.

Q. 15. At whose request?

A. At Mr. Simmons' and Mr. Gould's.

Q. 16. Will you tell the jury something or other about the size and character of the buildings?

Mr. Davenport: Just a moment, may it please the court. It doesn't make any difference. The question is, what is the value of it.

The Court: I think it makes a difference. I think the jury are entitled to that information.

Q. 17. What is the value of that pickle property there, excluding machinery?

Mr. Davenport: I object, may it please the court, unless he had shown his qualification.

[fol. 76] Q. 18. Now, will you tell the jury something about the size, the character and the condition of the buildings?

Mr. Davenport: Just a moment. May I ask him two or three questions on the question of his qualifications?

The Court: I think the jury are entitled to know something about the character and size and construction of the buildings. Go ahead and tell the jury.

Mr. Davenport: Your Honor will save me this question?

The Court: Yes. Now you may proceed, Mr. Witness.

Q. 19. Go ahead, Mr. Tuomey.

A. There is a four-tenement house on the lot and a pickle factory which I should say was about 75 feet long and probably 30 or 32 feet wide; and there are two pickle sheds where they store the pickles in the tanks. And then there is another shed where Mr. Swan had coal in. The price of the buildings and the land—at the time I appraised it there was about an acre of land. I wasn't there.

Mr. Davenport: Just a minute. Did you say what the price was?

The Court: No; he didn't say anything about the price.

Q. 20. Did you make the valuation of the cost of reproducing those buildings?

A. Yes, sir, I did.

Q. 21. And you are familiar with that work?

A. I am.

Q. 22. You have been a builder for how many years?

A. For eleven years.

Q. 23. In what general condition are the buildings?

A. Why, they are in a very good state of repair.

Q. 24. Do you know anything about the age of the buildings?

A. The four tenement house, as I recall, has been built about twelve years. The pickle sheds have been built longer than that; how much, I couldn't say as to that. And

that will answer it on the pickle factory, too. The pickle factory has been built on to at different times; enlarged. I couldn't say how many years it has been built.

Q. 25. How do you know the tenement house has been built about twelve years?

A. Well, I have been in business eleven years, and the [fol. 77] man that I worked for built the four tenements the last year before I worked for him.

Q. 26. Did you work on that?

A. I did a little; not much.

Q. 27. So you know something about it?

A. I do.

Q. 28. What is the value of the buildings? Are you in South Deerfield frequently?

A. Yes, I am. I had a contract there a year ago.

Q. 29. Can you give us any idea—not in dollars and cents, but listen to my question—how did the value of the buildings on October 1st, 1923, compare with the value of the buildings on the day that you examined it this year?

Mr. Davenport: May it please the court—

Mr. Bryant: Of course, they are a year older than they were at that time. He appraised them particularly on the twenty-fourth day of October. Now I want to know whether they have deteriorated or not.

Mr. Davenport: How could he tell what their condition was a year ago?

Mr. Bryant: Because he said so.

Mr. Davenport: I didn't hear him say so.

Q. 30. I asked you if you were familiar with the condition of the buildings a year ago.

A. I didn't understand it that way. I thought you asked if there had been any visit by me to South Deerfield, and I said that I had been there.

Q. 31. Did you know anything about the condition of the buildings at that time?

A. I would say, no; not in 1923. I had no occasion to go over on that street.

Q. 32. You didn't see them?

A. Not in 1923.

Q. 33. When was the last time that you saw them?

A. I may have driven by them on the street, but I had no occasion to examine them; but I had been around the buildings, because I done work for Mr. Swan.

Q. 34. What is the value of the buildings on November 24, 1924?

Mr. Davenport: I object, may it please the court; that is not the date.

[fol. 78] The Court: Well, I know; but is it so remote that we can't take the testimony?

Mr. Davenport: I think so.

Mr. Bryant: Well, if your Honor please, the buildings were not worth any less the year before than they were then. If we show a value, then they were worth more the year before.

The Court: Can you state of your own knowledge whether these premises have shown any substantial alterations within a year?

The Witness: I couldn't say that.

The Court: Well, how can he testify as to September, 1923? How can he help us on that? He doesn't even know whether the same buildings were there or whether they had undergone substantial alterations.

Mr. Bryant: I will show the value of them in 1924, and I will show that there was no change.

The Court: He doesn't know.

Mr. Bryant: But I will show by other witnesses that there has been no change at all in the buildings.

The Court: No change at all? With that understanding.

Mr. Bryant: No change of any account.

The Court: Do you say that they are substantially the same as they were a year ago? If you say so I will receive the testimony.

Q. 35. What is the value of the buildings?

Mr. Davenport: Now, there is one other *other* objection. This gentleman says he hasn't lived in South Deerfield for six years. He has shown no qualifications for buying and selling real estate in South Deerfield.

Q. 36. What is your knowledge of real estate in South Deerfield?

A. Why, I lived there twelve years and I was in the building business for five years, and I had an opportunity to value such buildings while I was there.

Q. 37. How far is that from Greenfield?

A. Nine miles.

Q. 38. Have you done any building in South Deerfield recently?

A. I have.

[fol. 79] Q. 39. How recently?

A. I completed a contract there last winter.

Q. 40. Are you familiar with the values of real estate in South Deerfield?

A. I would say I was.

Q. 41. Now, I will ask you again, what is the value of those buildings on the twenty fourth day of November, 1924?

Mr. Davenport: 1923, you mean?

Mr. Bryant: No; '24.

The Witness: In a lump sum?

Q. 42. Yes.

A. \$11,500.

Mr. Bryant: You may inquire.

Cross examination.

By Mr. Davenport.

X Q. 43. Have you bought or sold any real estate in South Deerfield, Mr. Tuomey, in the last six years?

A. No; I haven't.

X Q. 44. You say \$11,500 for the buildings?

A. Buildings and the land.

X Q. 45. Buildings and the land?

A. Yes.

Redirect examination.

By Mr. Bryant.

Q. 46. What are the buildings worth without the land?

Mr. Davenport: They were all together in the contract.

Mr. Bryant: That's true. That's all, Mr. Tuomey.

OTIS HAGER (sworn).

By Mr. Bryant:

Q. 1. What is your full name, please?

A. Otis Hager.

Q. 2. And where do you live?

A. In South Deerfield, Massachusetts.

Q. 3. How long have you lived there?

A. Seventy years.

Q. 4. What?

A. It will be seventy years next April.

Q. 5. Practically all your life?

A. I lived five years of my childhood in another town.

Q. 6. What is your business?

A. I am a retail lumber dealer.

Q. 7. Are you familiar with real estate values in South Deerfield?

A. I am to a reasonable extent.

[fol. 80] Q. 8. Do you know about the prices that property brings there?

A. I think I can say, unqualifiedly, yes. The house next to me was sold three months ago—

Q. 9. You need not go into that. You have sold houses there in Deerfield?

A. Yes, sir.

Mr. Davenport: You need not qualify Mr. Hager. He is qualified without any question.

Mr. Bryant: Oh, very well.

Q. 10. Are you familiar with the property in question; this pickle plant?

A. As familiar as you might expect a man who was retired in business. This is not on the main street. I am perfectly familiar with the street, the land and the buildings as we examined it four weeks ago.

Q. 11. You say you examined that property?

A. Yes, sir.

Q. 12. And specifically with a view of determining its value?

A. For just that cause.

Q. 13. And when did you do that?

A. On the 24th of November.

Q. 14. And with Mr. Tuomey?

A. Yes, sir.

Q. 15. And will you tell the jury what the value of the buildings—did you examine the machinery?

A. Not particularly the machinery; no.

Q. 16. You didn't make any appraisal of the machinery?

A. No.

Q. 17. Will you tell the jury what the value of the buildings and the land is exclusive of the machines?

A. In detail or as a whole?

Mr. Davenport: There is no machinery mentioned in the contract.

Q. 18. Will you answer my question?

Mr. Bryant: Will you read the question?

[Previous question read by stenographer as follows:]

"Q. 17. Will you tell the jury what the value of the buildings and the land is exclusive of the machines?"

The Court: Give it to us as a whole.

The Witness: \$11,500.

Mr. Bryant: You may inquire.

[fol. 81] Cross examination.

By Mr. Davenport:

X Q. 19. How do you get that, Mr. Hager?

A. In this way: This has a value, personal, of \$500 on the land; \$5,500 on the four tenement house; \$3,500 on the pickle factory, and \$2,000 on the sheds; on the other sheds.

X Q. 20. What is the \$3,500 on?

A. On the pickle factory.

X Q. 21. Did you look up before you made this appraisal the assessed valuation of the house?

A. I did not.

X Q. 22. Or any of the property there?

A. I did not.

X Q. 23. You simply lumped the real estate, the pickle factory, the tanks and the houses and the sheds and everything connected with the pickle business at \$11,500?

A. Yes, sir.

X Q. 24. You have it as you have divided it here?

A. Yes, sir.

X Q. 25. Now, Mr. Hager, I would like to have you answer me: What, in your opinion, would be the fair market value of that stuff providing it was put on to the market and sold just as it stood there?

A. I assume you will not ask me to answer that question in a single, short sentence, because property much more simple than a pickle factory depends on an unknown thing; who is there and how many are there who want to buy it. I couldn't answer your question, I am sure.

X Q. 26. Well, I will ask you this, then: Whether, in your opinion, if that property was put up at auction and sold at South Deerfield it would bring much more than \$5,000?

A. Because of the fact—

X Q. 27. No, sir. Just that question; yes or not.

A. I think it would.

X Q. 28. Well, how much more do you think it would bring?

A. I think that property would bring \$11,500.

X Q. 29. You think that is the fair market value for it?

A. I do.

X Q. 30. By the way—I don't want to have any misunderstanding here about this: Brother Bryant spoke about machinery. There is no machinery in here.

Mr. Bryant: Well, it is called "equipment". They don't use the word "machinery"; equipment of every name, nature and description. I asked him about the buildings and the land, and then I asked him to give the value excluding the machinery. Now, you interjected the word "tanks".

Redirect examination.

By Mr. Bryant:

Q. 31. Are there any tanks in those buildings?

A. Yes, sir.

Q. 32. Did you in your appraisal of \$11,500 consider the value of those tanks?

A. I did not.

Q. 33. Is there any other paraphernalia connected with the manufacture of pickles except simply tanks?

A. More or less machinery of rather a simple nature for the most part in the pickle factory.

Q. 34. In making your estimation of \$11,500 did you include any of this "more or less" machinery?

A. I did not.

Mr. Bryant: That's all.

Mr. Davenport: That's all.

HAROLD PARKER (SWORN):

By Mr. Malone:

Q. 1. What is your full name, Mr. Parker?

A. Harold Parker.

Q. 2. Of Springfield?

A. Yes, sir.

Q. 3. Massachusetts?

A. Yes, sir.

Q. 4. And how long have you been a resident of Springfield?

A. I have been in Springfield about four months.

Q. 5. What is your business?

A. Brokerage business of food products.

Mr. Malone: I am going to ask Mr. Parker a question which will involve the quality of the pickles eventually, and I expect and declare to your Honor that I will show that the quality of goods that I am asking about and their value I will prove by a witness who has seen them; Mr. Simmons. If that isn't the proper order in which I should proceed, I will withdraw Mr. Parker and call Mr. Simmons.

The Court: Do you object?

Mr. Davenport: Well, I don't want to be technical, may it [fol. 83] please the court, but my brother said that he was going to do certain things in order to get the other things in.

The Court: I think we ought to have the testimony in proper order.

Mr. Malone: Then I will withdraw Mr. Parker.

RAY C. SIMMONS (recalled).

Redirect examination.

By Mr. Malone:

Q. 228. Mr. Simmons, a provision of your contract with Mr. Swan, marked "Plaintiff's Exhibit A", provides: "The party of the first part further promises and agrees to and with the party of the second part to sell to said party of the second part all of the pickles now in tanks on said premises, and the party of the second part promises and agrees to pay therefor the sum of four dollars per thousand, according to the receipt book, cucumbers received, of the party of the first part as of October 1st, 1923." Did you after that time or before that time acquaint yourself, either personally or were you advised by Mr. Swan, as to the quality of the cucumber pickles as were on the pickle factory premises?

A. Yes, sir.

Q. 229. Tell us how and when.

A. According to his contract with the farmers and slips —

Mr. Davenport: Just a moment. I pray your Honor's judgment.

The Court: I guess you will have to withdraw it.

Q. 230. Did you come to find out the type of pickle that was there?

A. Yes, I did. They were to be 3½ inches and above as he received them from the farmers, and he agreed that the contract with the farmers —

Mr. Davenport: Just a moment. I suppose this man saw the pickles. If he did he can say so, instead of telling what the contract was with the farmers.

Q. 231. Your contract provides for four dollars a thousand for certain cucumber pickles. In compliance with the suggestion of Mr. Davenport I will ask you this: Did you at any time see those pickles?

A. Yes.

[fol. 84] Q. 232. What type of pickle were they?

A. Why, they were like what I bought. I took them to be like what Mr. Swan said they were as I bought them, and I bought—

Q. 233. What did Mr. Swan say they were?

A. He sold me pickles 3½ inches up. Good straight pickles. No crooks, nubs—in fact from there up to 600—no yellows.

Q. 234. How many years have you been in the pickle game?

A. Nineteen years.

Q. 235. There are different types of cucumber pickles, I suppose?

A. Why, there are number one cucumbers and there are—

Q. 236. You have used some terms that are unfamiliar to me. What length cucumber is a first-class pickle?

Mr. Davenport: Just a moment. There is nothing in here about first-class pickles. This man says he saw the pickles and, further, he bought what he saw.

Mr. Malone: Well, this is on the question of value.

The Court: Yes; he can testify from what he saw that they were first-class pickles, and he can give a price; a fair market price for them.

Mr. Malone: With your Honor's permission I was going to ask, perhaps for the information of all of us, what constitutes a first class cucumber pickle and what length, condition or shape does not constitute a first class pickle.

Mr. Davenport: I can't see how that is material. It simply says: "All the pickles in the tanks and on the premises."

Q. 237. Did you see these pickles?

A. Yes, sir.

Q. 238. What length were they?

Mr. Davenport: Well, how is that material?

Mr. Malone: It is material so far as value goes.

The Witness: It determines the value of pickles.

The Court: You have a right to describe what those pickles were in order that an expert may give the fair market price.

The Witness: They were bought for—

The Court: And having in mind the fair market price, tell us what they were.

The Witness: They were from $3\frac{1}{2}$ inches up, 600 in a cask.

[fol. 85] Mr. Davenport: It doesn't say anything about casks in here. They are in tanks.

The Witness: I don't know where you get the value without—

Q. 239. Never mind, Mr. Simmons. Just answer under the rulings of the court.

Mr. Davenport: Apparently this witness is rather anxious to get in the valuation of the sheets here, so I may have to object too frequently.

Mr. Malone: That observation I think is unnecessary and improper.

Q. 240. Proceed to describe the pickles that you saw there—cucumbers you did see there.

A. They were from $3\frac{1}{2}$ inches up to—well, seven inches. From $3\frac{1}{2}$ to 7 inches in length, and good, straight pickles. No crooks or yellow ones. Of course, when a pickle gets above—

Mr. Davenport: Just a moment. You have answered the question. I object.

Mr. Bryant: Ask him what a crook or yellow is.

Q. 241. What is a crook or a yellow cucumber?

A. A crook is a crooked pickle; a deformed pickle, and therefore of no value.

Q. 242. You have described these as straight cucumbers?

A. Yes, sir.

Q. 243. Are straight cucumbers more valuable than crooks?

A. Yes.

Q. 244. What do you mean by "nubs"?

A. It may not be crooked, but it is short and chunky. It has no value only for chopping or something of that sort; no sale value as a cucumber.

Q. 245. Had you had these pickles described to you by Mr. Swan or not before you saw them?

A. I certainly had.

Q. 246. And in what way? What did he say?

Q. Why, he told me that he had paid \$3.50 a thousand for his pickles. He paid 50 cents more.

Mr. Davenport: I object and ask to have that struck out.
The Court: That answer may go out.

Q. 247. Did he make any reference to these, as to whether they were first class pickles or not?

[fol. 86] Mr. Davenport: I object. It doesn't make any difference what he said before this contract was entered into.

The Court: No; the contract calls for the sale of the pickles.

Q. 248. I ask you, Mr. Simmons, after your experience of 19 years in this game whether or not these were first quality cucumber pickles?

A. They were.

Mr. Davenport: I object. I ask to have it struck out.
The Court: It may stand.

Mr. Davenport: Your Honor will save me the question.

Q. 249. And you say they were first class. Now, what experience in the pickle game have you had on which you can base an opinion that they were first class pickles?

A. Well, I have salted pickles for 19 years.

Q. 250. And where?

A. In Silver Lane.

Q. 251. Handling how much business down there per year?

Mr. Davenport: Oh, just a moment. I object.

Mr. Malone: Well, I want to satisfy you that in the judgment of Mr. Simmons—

The Witness: About 200,000.

Q. 252. About 200,000—

A. Dollars a year.

Q. 253. Does this appertain to one kind of pickles?

A. Why, to the full line that we carry on there.

Q. 254. It has been mentioned early in the day that you pickled cabbage and cauliflower and peppers as well as cucumbers?

A. Yes.

Q. 255. Whether or not cucumbers form the substantial part of your business?

A. Why, cucumbers are the substantial——

Mr. Davenport: Will you answer the question, please.

The Witness: Yes; cucumbers are the substantial part of the business.

Mr. Malone: I think that's all.

Recross-examination.

By Mr. Davenport:

X Q. 256. You did not have any interest in the Silver Lane Pickle Company in 1923 except as an employee?

A. I did.

[fol. 87] X Q. 257. I say, except as an employee.

A. I had an interest in the business.

X Q. 258. You did have?

A. Yes, sir.

X Q. 259. Drawing a salary?

A. Yes, sir.

X Q. 260. And that was the only thing?

A. No, sir.

X Q. 261. What else?

A. Why, a percentage of the net profits.

X Q. 262. That is, that was above your salary?

A. Above my salary, sure.

X Q. 263. You were salesman for the concern?

A. I was manager.

X Q. 264. The concern was owned—well, no matter. Now, how many tanks of pickles were there there in 1923?

A. At South Deerfield?

X Q. 265. At Swan's place in South Deerfield when you looked at them?

A. Twelve large ones.

X Q. 266. How many small ones?

A. I think there were about eight or nine small ones, and this small shed they spoke of as a coal shed.

X Q. 267. And those pickles were in what they call the "brine"?

A. Yes, sir.

X Q. 268. You know what that is?

A. There is only one thing for brine.

X Q. 269. What is it? Tell the jury.

A. Salt and water.

X Q. 270. And the cucumbers are brought in by the farmer and dumped into these tanks?

A. Broadly——

X Q. 271. Answer that question.

Mr. Malone: You didn't ask him a question.

The Witness: I beg your pardon. Then I will have to explain.

Mr. Davenport: Wait a moment. If I don't ask you a question I don't want you to answer.

X Q. 272. Were those pickles brought in by the farmers and dumped into these tanks?

A. No, they were not.

X Q. 273. What were they put into?

A. Someone put them into the tanks. They came from the farmers.

X Q. 274. They came from the farmers and were put into [fol. 88] the tanks?

A. You asked me if the farmers dumped them into the tanks.

X Q. 275. They were brought in in some way and put into the tanks?

A. They must be. They grew on the farms.

X Q. 276. Then after that there was no assorting made at that time?

A. The farmers brought the stuff.

X Q. 277. I say, there was no assorting made at the factory at that time?

A. I supposed there was.

X Q. 278. I am asking you.

A. I wasn't there.

Mr. Malone: The custom of the business, I suppose, has something to do with it. He knows the pickle game.

X Q. 279. When you were there the brine was added to them?

A. Yes.

X Q. 280. The pickles were grown in the month of September or July?

A. Why, August and September; a few in July—the last part of July.

X Q. 281. You were there, then, at just about the time that these pickles were coming in from the farms? Answer that yes or no.

A. He stopped soon after—

X Q. 282. No. I say you went there first to see him, you said, the twenty-seventh day of August, which was when the pickles were coming in from the farmers?

A. Yes, sir.

X Q. 283. You saw some of them coming in?

A. Yes, sir.

X Q. 284. You saw what was done with them?

A. Why—

X Q. 285. Yes or no.

A. Yes.

X Q. 286. You saw them dumped into these tanks?

A. Yes.

X Q. 287. Right from the bags or from the trucks—whatever it was?

A. No; I saw them—

X Q. 288. You saw them dumped into the tanks?

A. I suppose they were dumped—

X Q. 289. Didn't you see them?

A. I didn't see them that day.

X Q. 290. You saw them when they were coming in, didn't you?

A. Yes.

X Q. 291. And you knew that is where they went?

A. I suppose that is where they went.

[fol. 89] X Q. 292. You inspected them at the time—

A. No; I did not.

X Q. 293. Well, at some time you did?

A. I did after they were in the brine; yes, sir.

X Q. 294. And then you made your contract?

A. Why, I wouldn't say that I did. I took Mr. Swan's word for it—yes, we did; we tested the brine and dug in and pulled out some of the pickles before the contract was made out.

X Q. 295. So you knew what the pickles were from your own observation?

A. Yes, my own observation.

X Q. 296. And then you went farther than that and took Mr. Swan's receipt book where he had torn out receipts for the farmers to take away and kept a stub of the pickles that had been taken away?

— I didn't myself personally. My sister did, and his daughter and Mr. Swan and I helped out in any way we could. We went out and looked at the pickles while we were there.

X Q. 297. You not only had access to the receipt book, but you also had access to the pickles themselves?

A. Certainly.

X Q. 298. The pickles which you saw in those books were farmers' run pickles, were they not?

A. They were.

X Q. 299. Just as they came from the field?

A. No; they were not.

X Q. 300. Well, just as they came from the bags that were emptied into the tanks?

A. I suppose they were.

X Q. 301. You knew they were farm-run pickles?

A. Yes, sir.

X Q. 302. And from your observation you saw nubs and crooks in those pickles?

A. No, I did not.

X Q. 303. When you fished them out you found crooks in them?

A. No.

X Q. 304. In all, no nubs?

A. No.

X Q. 305. Did you ever see a farm-run pickle that didn't have a crook or a nub in it?

A. I told you I have.

X Q. 306. You have?

A. Yes, sir.

X Q. 307. Those were all straight, first-class pickles in that brine that you saw there?

A. Yes, sir.

Mr. Davenport. That is all.

[No cross interrogatory numbered 308.]

[fol. 90] Redirect examination.

By Mr. Malone:

Q. 308. Why do you say they were? Do you know anything about the quality of the pickles that Mr. Swan is accustomed to buy?

A. Yes, sir.

Q. 310. What kind?

A. He buys number one stock.

Q. 311. And it was number one stock that was being brought in there at the time you saw them?

A. Yes.

Recross examination.

By Mr. Davenport:

X Q. 312. One question I omitted: You bought pickles of Mr. Jewett at just about that time?

A. Yes, sir; no, sir; no, sir, I did not.

X Q. 313. Well, practically the same time?

A. No, sir.

X Q. 314. How much later?

A. Didn't buy any.

X Q. 315. Didn't buy any?

A. Never went over to Mr. Jewett's place.

X Q. 316. Did you tell Mr. Swan that you did purchase—

A. No, sir.

X Q. 317. Just a moment; if you will wait until the question is asked you, you may be able to answer it more intelligently.

A. All right, sir.

X Q. 318. Did you tell Mr. Swan that you had bought a certain number of pickles of Mr. Jewett of the same kind that he was selling to you—

A. No, sir.

X Q. 319. — for three dollars and fifty cents a thousand?

A. No, sir.

X Q. 320. You did not tell him so?

A. No, sir.

X Q. 321. And, as a matter of fact, you did not buy any pickles of Mr. Jewett?

A. No, sir.

X Q. 322. Now, is there any chance that you didn't buy them, but that they were bought for the pickle concern?

A. The other people bought some of Jewett.

X Q. 323. Who are the other people?

A. Why, I never was in Mr. Jewett's place.

X Q. 324. Now, wait just amount. Who were the other people that you refer to?

A. Mr. Gould and Mr. Molumphy.

[fol. 91] X Q. 325. Your associates?

A. Yes, sir.

X Q. 326. Now, did you tell Mr. Swan that your concern had purchased—

A. No, sir, and they never—

X Q. 327. Wait a moment. Had purchased from Mr. Jewett pickles of a similar kind at that time at three and a half a thousand?

A. No, sir.

X Q. 328. Did your concern, as a matter of fact, buy pickles from Jewett at three and a half a thousand?

A. No, sir.

X Q. 329. In 1923?

A. No, sir.

X Q. 330. Did your concern—Molumphy or Gould—buy some?

A. They did buy some.

X Q. 331. When?

A. They bought them a little—

X Q. 332. "They bought them a little" what?

A. The time that I bought those of Swan.

X Q. 333. What do you mean by "a little"?

A. Why, a little before. I will say a week.

X Q. 334. Then you did tell Swan that somebody bought some pickles?

A. I might have told him that the Silver Lane Pickle Company had bought some pickles, but never said anything about three and a half dollars a thousand, because no pickles were ever sold for that price last year.

X Q. 335. Now, wait a minute. Don't get excited. Then they were the same kind of pickles—

A. No, they were not.

X Q. 336. — that Swan was handling?

A. No.

X Q. 337. What was the difference?

A. They were seconds.

X Q. 338. What was seconds?

A. That the Silver Lane Pickle Company bought from Jewett.

X Q. 339. Yes. How do you define a second?

A. Define?

X Q. 340. Yes.

A. I said nubs and crooks and imperfect pickles.

X Q. 341. And straight ones, too?

A. No.

X Q. 342. And farm-run pickles?

A. No. He paid —

X Q. 343. Those were a farm-run pickle?

A. No; they were —

X Q. 344. Wait a moment. You have answered the question.

A. The seconds were a farm-run second —

X Q. 345. No; I say the pickles that you bought, or the [fol. 92] Silver Lane Pickle Company bought, were not farm-run?

A. They were seconds.

X Q. 346. I say they were not farm-run. Will you say that?

A. No, I won't.

X Q. 347. No; that's what I thought. That's all.

Redirect examination.

By Mr. Malone:

Q. 348. What was the type of pickle that the Silver Lane Pickle Company bought from Mr. Jewett?

A. They were the last runs. It was four tanks of the last picking that we had, and Mr. Swan refused to take them and Jewett took them in after Mr. Swan stopped taking in pickles.

Mr. Davenport: What is that? I move that be stricken out.

Q. 349. What I wanted to find out is, if there is a difference between such pickles as you claim Mr. Swan had in his tanks and was purchasing, and the type of pickle which the Silver Lane Pickle Company bought from Jewett?

A. Yes, sir.

Q. 350. What is the name of the pickle they bought from Jewett? That is, the cucumber as differentiated from the pickle that Swan handled?

A. Those were seconds we bought. We bought them for seconds.

Q. 351. Were there any seconds in the pickles which Mr. Swan had?

A. No, sir; there were none that I saw.

Q. 352. Well, did you see what he had?

A. Why, I looked them through as well as anyone could and took his contracts with his farmers.

Q. 353. I think you already said that Mr. Swan did not handle seconds.

A. He did not. He refused to take them.

Recross examination.

By Mr. Davenport:

X Q. 354. I understood you said you looked at all these tanks of pickles?

A. No, sir; I did not.

X Q. 355. How many tanks did you look at, then?

A. The majority of them; the tops of them.

X Q. 356. And took samples of the brine in the majority of them?

A. I took samples of every tank except those little small ones in the coal shed. All the big tanks—we tested the other tanks.

[fol. 93] X Q. 357. And why did you test the other tanks?

A. To see if the test was up. The salt was a little low, and therefore we decided that we should put on a little extra salt. He didn't have enough salt, so we sent up some salt by our trucks. The men from the Silver Lane Pickle Company brought the salt up. If you don't keep the salt up the pickles are liable to get soft.

X Q. 358. Then you want this jury to believe that you tested all of those tanks?

A. Yes, sir; all of those except the two small ones that I mentioned.

Mr. Malone: You did look at the pickles?

The Witness: Yes. Mr. Swan will testify to that. Mr. Swan was there with me and we looked at the pickles.

Mr. Malone: That's all.

[Adjourned.]

Boston, Mass., December 18, 1924.

RAY C. SIMMONS (recalled).

Redirect examination.

By Mr. Malone:

Q. 359. My recollection, Mr. Simmons, is that when the court adjourned last evening we were discussing the fact that when you and Mr. Swan looked over the pickles and tested out the quality of the brine that you found it lacking in the proper amount of salt in the solution, and that Mr. Swan didn't have any salt on hand—

Mr. Davenport: Just a moment. I pray your Honor's judgment. I think my brother should ask a question.

Mr. Malone: I don't think it is objectionable, although I can have the question read and answered.

Mr. Davenport: Just a moment. Is this something my brother omitted?

Q. 360. Did you, as a matter of fact—

The Court: He was under redirect examination when you examined him.

Mr. Davenport: Oh, was he?

Q. 361. Whether or not you did send up from Connecticut any salt for use on those pickles?

A. Yes, sir.

[fol. 94] Q. 362. How much?

A. Eighteen bags.

Q. 363. And what did that represent in money?

Mr. Davenport: I object.

The Court: Is that an element of damage; the expense that he went to?

Mr. Malone: It is, your Honor.

Q. 364. Did you say thirty bags?

A. Eighteen bags.

Q. 365. How much did that represent in money?

A. The bags were 140 pounds to a bag; and around \$20 worth of salt.

Q. 366. So that the total value of the salt irrespective of delivery was \$20?

A. Yes, sir.

Q. 367. Do you know whether or not this salt was put on the pickles?

A. Why, it was, by our man.

Q. 368. Why by your man?

A. Because Mr. Swan told him that he was through; that we owned the pickles and therefore it was his job to put on the salt, which he went ahead and put it on.

Q. 369. Can you tell his Honor and the jury from your own knowledge whether or not—what the condition of this real estate was on September 13th, 1923, with reference to its having been painted or improved of that date as of October 1st, 1923?

A. The house and factory had all been newly painted outside.

Q. 370. When?

A. During the summer of 1923. And also the inside was all painted white.

The Court: Well, that is before the contract.

The Witness: Yes, before the contract. That was the condition.

Q. 371. Now, whether or not there has been any change so far as—whether or not you know of any change in the property in the way of improvements from October 1st, 1924, up to November 24th, 1924?

A. Why, I haven't been on to the property.

Q. 372. I mean, October 1st, 1923.

A. I haven't been on to the property. I have been—

Mr. Davenport. I object.

The Court: Then he can't answer.

Q. 373. You said it had been newly painted preceding October 1st, 1923; painted outside and in?

A. Yes, sir.

[fol. 95] Q. 374. Now, whether or not, Mr. Simmons, the Silver Lane Pickle Company preceding September 13th, 1923, had had during the months—say the preceding six months—had had any business transactions between yourself and Mr. Swan in the nature of purchase of pickles from Mr. Swan?

A. Yes, sir.

Q. 375. On how many occasions?

A. Why, Mr. Molumphy and myself made two or three purchases, but they were shipped in—oh, I would say half a dozen shipments and paid in a half a dozen invoices.

Q. 376. In what form was the payment made?

A. By check.

Mr. Davenport: I object. I move to strike it out.

The Court: Excluded. Immaterial.

Mr. Malone: My purpose in asking the question, your Honor, is to establish the custom and method of doing business.

The Court: Buying pickles is one thing and buying a pickle plant is another thing.

Mr. Malone: Of course, your Honor will recall that a substantial element of damage as claimed by the plaintiff in some 14,000 700 or 900 dollars of pickles in the deal in which the building was involved.

The Court: Yes.

Mr. Malone: And it is our claim, respectfully made, that we should be permitted to show the method of business as between Mr. Swan and Mr. Simmons and his associates. In other words, that if we can prove—

The Court: How does that have any tendency to show the amount of damage? You don't offer it on the question of damage, do you?

Mr. Malone: No, your Honor. We are offering it simply anticipating any renewal of claim by the defendant that we did not fully perform with Swan in accordance with business methods, and that when Swan—

The Court: I think the proper theory to try this case is the same as that in 255 Federal, 892. In the Circuit Court of Appeals there was a check used in making a first pay-

ment on a contract as it is in our case. And the court ruled [fol. 96] it shouldn't be held that the defendant by accepting a check made at the time of entering the contract hurt himself at the time of performance thereby. I don't think it is material in this case.

Mr. Malone: I want to extend my claim, if your Honor please, to this effect: that if we can show that Mr. Swan had received during the preceding six months half a dozen checks running into the hundreds of dollars from the plaintiff and his associates, that his refusal to so receive this certificate of deposit or cashier's check, as the case may be, on October 1st was evidence of an evasion on his part; a subterfuge.

The Court: That is on the question that I am going to submit to the jury?

Mr. Malone: Yes.

The Court: As to whether a tender was waived.

Mr. Malone: That it is fair evidence to offer to prove that we could show a part of a series of acts which tend to prove the evasion by Mr. Swan and attempt of subterfuge to get out of his legal obligations.

The Court: I have difficulty to see how the evidence would show that he prevented or obstructed the defendant. I don't know that it would be open to you to show in all the dealings that he had—I think perhaps I will admit it.

Mr. Davenport: Your Honor will save me an exception?

The Court: Yes.

Mr. Davenport: Your Honor has in mind, have you not, that it is not between this man and Mr. Swan, but between a third party and Mr. Swan? The Silver Lane Pickle Company is not a party to this action.

The Court: I didn't have that in my mind.

Mr. Davenport: You didn't have that in mind?

The Court: No. This is the first transaction between Mr. Simmons and Mr. Swan; is that right?

Mr. Davenport: Yes.

Mr. Malone: Oh, no; the purchase of these pickles as I understand the witness was made by Mr. Simmons in person from Mr. Swan, but the payments I apprehend—the [fol. 97] vouchers will show that the payments were made by the Silver Lane Pickle Company of which he was a part.

Mr. Bryant: And that letter of Mr. Swan's relates to the payment of these pickles.

Mr. Malone: Of course, from the evidence at hand, Mr. Gould of the Silver Lane Pickle Company, the president, was the man who procured this certificate of deposit at the South Deerfield bank, and no question was raised that Mr. Gould didn't have a perfect right to effect the certificate of deposit in the name and behalf of Mr. Simmons. For the sake of convenience it would have been better for Mr. Simmons to take in his name the contract from Mr. Swan.

The Court: I exclude it. And save your exceptions?

Mr. Malone: Yes; please. Well, I think that's all, Mr. Simmons.

W. C. BARTLETT (SWORN).

By Mr. Malone:

Q. 1. Your full name, Mr. Bartlett?

A. W. C. Bartlett.

Q. 2. And where do you live?

A. Boston.

Q. 3. What is your business?

A. Broker.

Q. 4. Dealing in pickles?

A. Yes.

Q. 5. What is the name of the house? The house with which you are connected?

A. W. C. Bartlett Company.

Q. 6. And you are W. C. Bartlett?

A. Yes.

Q. 7. How many years have you been dealing in the brokerage business in connection with pickles?

A. About six years.

Q. 8. Are you familiar with the market value of cucumber pickles from time to time?

A. Yes.

Q. 9. Whether or not you are familiar with and can testify to the value of cucumber pickles of a certain type about which I shall ask you during the months of September and October, 1923?

A. I am.

Q. 10. Whether or not there was a substantial rise in the price of cucumber pickles from and after the middle of September, 1923, up to, say, the middle of October, 1923?

[fol. 98] Mr. Davenport: I object, may it please the court.

The Court: It may be answered.

Mr. Davenport: Your Honor will save me an exception. This gentleman has not shown that he has any qualification, may it please the court.

The Court: Go ahead and answer it.

The Witness: I would say there was.

Q. 11. And why, if you know?

Mr. Davenport: Will your Honor save me an exception to that?

The Court: Answer it.

The Witness: I think I do know.

Q. 12. Proceed to tell his Honor and the jury.

A. Somewhere between the 10th and 15th of September, 1923, there was a severe freeze throughout the pickle belt where perhaps 75 per cent of all the pickles of the United States, or of the cucumbers, are grown.

Q. 13. What section of the country is that, Mr. Bartlett?

A. Why, I would define it as Michigan, Indiana, Iowa and part of Illinois and Wisconsin.

Q. 14. You have, I suppose, like they do for cotton, a center of the pickle brokerage industry in the country?

A. Yes.

Q. 15. What is that center?

A. Why, Chicago.

Q. 16. Is it a price fixing center? That is to say what is the broadcasting station of the pickle game so far as rates are concerned?

A. Why, Chicago. Prices are made there.

Q. 17. Now will you state, Mr. Bartlett, what the fair market value per thousand of cucumber pickles; straight goods, none under 3½ inches, of no crooks or nubs; was on October 1st, 1923?

Mr. Davenport: May it please the court, I object.

The Court: Aren't we concerned with what the fair market value of the pickles would be at the tanks at South Deerfield? Can he give their value?

Mr. Malone: I am quite confident that he can, your Honor. Perhaps I ought to withdraw that question and ask with reference to the pickle market some other question.

Q. 18. Whether or not there is a standard price for [fol 99] pickles at different periods of the year in New England—cucumber pickles? In other words, do the quotations—

A. Absolutely.

Mr. Davenport: Wait just a minute; you have answered the question.

Q. 19. Do quotations change from time to time?

A. Absolutely they do; yes.

Q. 20. And what fixes the price?

A. They law of supply and demand.

Q. 21. Now will you tell his Honor and the jury what the fair market price of cucumber pickles per thousand was on a stock known as straight goods; none under 31 1/2 inches; no crooks or nubs; at South Deerfield, Massachusetts, on October 1st, 1923?

Mr. Davenport: I object may it please the court.

The Court: That may be admitted.

Mr. Davenport: He was shown no knowledge of what the price was at that time.

Mr. Malone: Well, you can cross examine this witness.

Mr. Davenport: Save an exception, if you please.

The Court: I think perhaps you had better ask him whether he can give the fair market value of pickles at South Deerfield at the time you describe.

Mr. Malone: Yes, your Honor.

Q. 22. Can you give us the fair market value of pickles such as I have described in my previous question at South Deerfield on October 1st, 1923?

A. If South Deerfield takes the same rate of freight that other New England points take, I can.

Q. 23. And does it, as a matter of fact?

A. Presumably it does.

Q. 24. It has appeared in evidence that South Deerfield is about nine miles from Greenfield.

A. Well, there would be, of course, a cartage charge added to what you would have to—

Q. 25. Well, lay out your cartage charge. We are not claiming every two-cent piece. Now, Mr. Bartlett, what is the fair market value of cucumber pickles on October 1st, 1923, at South Deerfield?

Mr. Davenport: Now, it seems to me that this man has shown himself to be entirely incompetent to answer the question.

[Id. 100] The Court: Go ahead and answer the question.

The Witness: \$10 a thousand at the nearest railroad point.

Q. 26. And that figure you say excludes the cost of cartage?

A. Yes.

The Court: You would have to deduct the cost of getting it to the railroad station?

The Witness: The nearest railroad point to South Deerfield.

The Court: That is the value of them at that point?

The Witness: On the cars of the railroad, and plus the cost of getting them to the plant at South Deerfield, Mass.

Q. 27. Now, I think you have already testified that there was a substantial increase in the value of this type of cucumber pickle between September 10th and this date of October 1st, 1923?

A. Yes.

Q. 28. Due to this killing frost in the West?

A. Yes, sir.

Q. 29. Whether or not this price that you offer or testify to, Mr. Bartlett, appertains to cucumber pickles of the type described in brine?

A. It does.

Cross examination.

By Mr. Davenport:

X Q. 30. Were you ever at South Deerfield?

A. No, sir.

X Q. 31. Don't know where it is?

A. Why, I have, of course learned during all this trial where it is.

X Q. 32. That is the first time you knew anything about it?

A. Yes.

X Q. 33. You never bought or sold any pickles in South Deerfield?

A. No.

X Q. 34. Where did you live prior to six years ago? You said you had been in Boston six years.

A. No; I said I sold pickles six years.

X Q. 35. Where do you reside?

A. Boston.

X Q. 36. And have you resided there right along?

A. Since June 1st.

X Q. 37. This year?

A. Yes.

X Q. 38. Where did you reside before that?

A. New Haven, Connecticut.

[fol. 101] X Q. 39. Are you connected with the Silver Lane Pickle Company?

A. No.

X Q. 40. Your business is just simply brokering?

A. Exactly.

X Q. 41. And take a commission for doing it?

A. Yes, sir.

X Q. 42. You never saw any vats in South Deerfield or any pickles in South Deerfield?

A. No.

X Q. 43. You yourself have no knowledge whatever of pickles in brine in the locality?

A. No.

X Q. 44. You never bought any pickles from the farmers or put them in brine?

A. No.

Mr. Davenport: That is all.

Mr. Malone: That's all.

HAROLD PARKER (recalled).

Direct examination resumed.

By Mr. Malone:

Q 6. You gave your full name before, Mr. Parker.

A. Harold N. Parker.

Q 7. Harold N. Parker of Springfield?

A. Yes, sir.

Mr. Davenport: I think that in order to protect my client's interest that I should ask your Honor to strike out the testimony of the preceding witness.

The Court: And I overrule the motion.

Mr. Davenport: Save my exception.

Q 8. What is your business, Mr. Parker?

A. Brokerage business of food products.

Q 9. And including in that pickles?

A. Yes, sir.

Q 10. How many years have you been in the brokerage business?

A. Six years.

Q 11. What is the name of the firm?

A. B. C. Winchell.

Q 12. With a present office at Springfield?

A. Yes, sir.

Q 13. How many years have you been connected with this business?

A. Six years.

Q 14. Now, are you familiar with market quotations and values of cucumber pickles from time to time?

A. I am, yes, sir.

Q 15. Whether or not there was any substantial difference [fol 102] once in the value of cucumber pickles about the months of September and October, 1923?

A. Yes, sir, there was.

Q 16. Increase or decrease in the value?

A. Big increase.

Q 17. Why?

A. Due to a freeze; a freeze which killed the growing stock at about the 11th or 12th of September.

Q. 18. Of 1923?

A. Yes, sir.

Q. 19. Can you state from your knowledge of that period when that information first became public property in the East?

A. Why, I don't know as I could that. I could say when it affected the market in the East, though.

Q. 20. That is what I want.

A. I don't think it affected the market materially in the East for ten days or two weeks here in the East.

Q. 21. It occurred around the 12th or 11th of September, 1923?

A. Yes, sir.

Q. 22. Now, will you tell us whether you agree with Mr. Bartlett that the price fixing location of the pickle market in America, that is, the United States, based upon supply and demand is Chicago?

A. It is, absolutely; yes, sir.

Q. 23. If you were to purchase pickles, say, at Long Island, or anywhere in Massachusetts, what would fix the price paid?

A. The Chicago market. The chances are you would have to go there to get the price on it. Most pickles are sold through Chicago.

Q. 24. What was the fair market value—can you tell us what the fair market value of pickles of the cucumber type, not under 3½ inches in length, straight stock, without nubs or crooks, in brine, say, at South Deerfield, Massachusetts, on October 1st, 1923? Can you or not? That is the question.

A. Yes, sir.

Q. 25. And now will you proceed to do so—per thousand.

Mr. Davenport: Now, the same objection.

The Court: Yes.

Mr. Davenport: Save an exception.

The Court: Yes.

Q. 26. I want the price per thousand. I omitted that in my question.

A. Why, the price per thousand at the nearest railroad [fol. 103] station, the nearest station to which it could be shipped to South Deerfield, would be \$10 a thousand, sir.

Q 27. Whether or not the price was substantially less than that during the first days of September, 1923?

A. Very much less.

Mr. Malone: You may inquire.

Cross examination.

By Mr. Davenport:

X Q 28. You say you have been in Springfield a month?

A. No, sir; I didn't say that. About three or four months.

X Q 29. Your office is here?

A. Yes, sir.

X Q 30. Where have you resided before?

A. In New York State.

X Q 31. And that is quite a good sized State?

A. Yes, sir.

X Q 32. I asked you where you resided.

A. Oh, in the central part of New York State, at Cortland.

X Q 33. At Cortland?

A. Yes, sir.

X Q 34. What was your business there?

A. The same business.

X Q 35. How long have you been in that business?

A. Six years.

X Q 36. Altogether?

A. Yes, sir.

X Q 37. You moved your office here about six months ago?

A. No, we have other offices besides Courtland.

X Q 38. Then you opened an office here about three months ago?

A. Yes, sir.

X Q 39. Now, you know nothing about pickles at South Deerfield only as you do it by deduction?

A. Well, what you say is true.

X Q 40. Now, there are printed lists, are there not, put out stating the market value of pickles?

A. Yes, sir.

X Q 41. Have you one of them of October 1st, 1923?

A. I have; yes; several.

X Q. 42. Several for that day?

A. Several for that immediate time. That is, thereabouts; within a very few days.

X Q. 43. And those are put out where?

[fol. 104] A. Those are put out or originate from the bigger factories in the West. Also by the big handlers of pickles in Chicago.

X Q. 44. Where did you figure the destination of these pickles?

A. Where?

X Q. 45. Yes.

A. At South Deerfield.

X Q. 46. That is, f. o. b. cars South Deerfield?

A. This \$10 price you mean?

X Q. 47. Yes, sir.

A. Yes, sir.

X Q. 48. Delivered on cars at that place?

A. Yes, sir.

X Q. 49. But you never went to South Deerfield yourself?

A. No, sir.

X Q. 50. Don't know anything about it?

A. No, sir.

X Q. 51. Where did you figure the destination of those pickles? Chicago or Boston?

A. The destination, you mean, at \$10?

X Q. 52. Yes.

A. Why, at the nearest railroad point to South Deerfield.

X Q. 53. I say, to what point were they going at that time on your basis of figuring?

A. To South Deerfield.

X Q. 54. Well, they were going to be shipped somewhere, I suppose, in your mental calculation. You were going to have those pickles shipped somewhere to some market.

A. You mean, from South Deerfield?

X Q. 55. Yes.

A. They were worth that there. No place in particular. If they were going to be shipped there to a consumer, that would cost—they would be worth more. The price of \$10 is the price of food stock on that date.

X Q. 56. Food stock where?

A. Food stock at South Deerfield.

X Q. 57. Anywhere else in the country besides South Deerfield?

A. Yes, sir.

X Q. 58. Where else?

A. In the biggest markets in the country; around Chicago.

X Q. 59. \$10 was the price there?

A. Yes, sir.

X Q. 60. F. o. b. cars?

A. Yes, sir.

X Q. 61. The same. And that price started, you say, between the fifteenth and first day of October?

[fol. 105] A. Well, I don't know. The information was not generally known for about two weeks after the freeze.

X Q. 62. Well, when was the freeze?

A. The freeze was the eleventh or twelfth day of September, as I recollect.

X Q. 63. So it would be somewhere around the twenty-second day of September?

A. I should say so. There may have been just a little sooner than that, but not much.

X Q. 64. I notice that you gave this as based on pickles three inches in length?

A. I did; yes, sir.

X Q. 65. And perfectly straight.

Mr. Malone: Three and a half.

X Q. 66. Three and a half, and perfectly straight and free?

A. Yes, sir.

X Q. 67. In what form?

A. In salt brine.

X Q. 68. Kegs or barrels?

A. No, sir. That is excluding the price of barrels. That is loose stock.

X Q. 69. Do you load loose stock on to cars?

A. No, sir, you do not, unless you load it into tank cars.

X Q. 70. So that you figured on these being taken from the brine and put into barrels?

A. Yes, sir; to be shipped. That is why I said they would cost more to be shipped to somebody.

X Q. 71. You did not anticipate at any time that these pickles could be taken out by the pailful and taken over and put on to the cars?

A. No, sir.

X Q. 72. You did include, then, in your price of pickles f. o. b. the kegs and the labor of getting them there?

A. No, sir, I didn't.

X Q. 73. Oh, you didn't?

A. I said that \$10 was the price of the loose stock.

X Q. 74. The only thing you excepted a moment ago was cartage.

A. No, sir. I said cartage and cooperage.

X Q. 75. You don't know anything about what the cartage would be?

A. No, sir, I don't know. It would depend on where it was going to.

X Q. 76. And that was excluded?

A. Yes, sir.

X Q. 77. So that if this cost 50 cents a thousand, it would be—

A. \$10.50.

[fol. 106] X Q. 78. Let's understand this: If it cost 50 cents to get them on cars, then they were worth \$10.50 instead of \$10?

A. Yes, sir; without the cooperage.

X Q. 79. And if it cost 50 cents to haul them over there, they would be worth \$11?

A. Yes, sir.

X Q. 80. Keep going up?

A. Yes, sir.

X Q. 81. So that in the tank alone just as they came from the form loose, with salt and vinegar, those pickles were worth there in South Deerfield \$10?

Mr. Malone: You said "with vinegar." Do you mean vinegar?

The Witness: You don't mean "vinegar." Just salt and water.

XQ. 82. I guess I don't. \$10.

A. Yes, sir.

X Q. 83. Now will you produce your printed list for October 1st?

A. Yes, sir. Here is one. [Searching among papers.]

X Q. 84. I asked you if there was a printed list gotten out by the dealers.

The Court: Better take the witness stand.

The Witness: You said "printed." I thought you meant typewritten as we get our lists.

X Q. 85. Isn't there a regular list published by the Chicago outfit showing the price day by day of pickles?

A. That I couldn't say. I receive none, sir.

X Q. 86. You receive none?

A. No, sir; I receive my quotations from the brokers and pickle factories.

X Q. 87. You do business with the Silver Lane people?

A. I have; yes.

X Q. 88. Handled their business for them—their pickle business?

A. No, sir.

X Q. 89. Brokerage?

A. No, sir.

X Q. 90. Bought from them?

A. No, sir.

X Q. 91. Sold to them?

A. I have not; no, sir.

X Q. 92. Well, what business did you do with them?

A. On vinegar.

X Q. 93. Oh, you handle vinegar?

A. Yes, sir.

X Q. 94. You sell them vinegar?

A. Well, I have sold them vinegar.

[fol. 107] X Q. 95. So when you said a few moments ago that there were printed lists, in answer to my question, you know of no such lists?

A. Not being printed in the sense of being printed on a press.

X Q. 96. I mean, a general list that is put out to the trade.

A. I know of none; that is, I received none.

Redirect examination.

By Mr. Malone:

Q. 97. What are those lists?

A. I have one here from Budlong, the biggest in the country.

Q. 98. What period is that?

A. What do you mean?

Q. 99. What date?

A. Of October, 1923.

Q. 100. Whether or not that is the manner in which you get your quotations?

A. It is.

Q. 101. In other words, that is your quotation sheet?

A. Yes, sir—this is not; no. This is the way we get our quotations. I wrote to them to get from them what their quotations were on that date, as I hadn't preserved my list that I had received.

Q. 102. What is the other list?

A. From Alart & McGuire Company.

Q. 103. As I understand you, no publication is made on printed form of quotations in the pickle market from day to day, or from week to week?

A. None that I know of; that is, of the brokerage people's.

Q. 104. Whether or not these quotations appear on the boards throughout the stock exchanges?

A. No, sir.

Mr. Malone: That is all.

Recross examination.

By Mr. Davenport:

X Q. 105. Just a question or two. Then what you did when this case was called to your attention was to write out to these people for what the quotation was October, 1923?

A. Yes, sir.

X Q. 106. And it is on their letters that you are basing your testimony here today?

A. Yes, sir.

Mr. Davenport: I ask to have it struck out, may it please the court.

The Court: I think it should go out. The effect of this [fol. 108] is that the pickle concerns are testifying rather than this witness, and we can't receive testimony that way. Unless you have some independent source of price other than those letters I shall exclude the testimony.

Mr. Malone: I must confess that this is quite some news to me, too. I think, however, that Mr. Parker—if necessary, Mr. Parker can give us some personal knowledge.

Redirect examination.

By Mr. Malone:

Q. 107. First, let me go back again: Have you personal knowledge, Mr. Parker, whether or not there was a substantial rise in the pickle market in cucumbers between the middle of September and the first of October, 1923?

A. I have; yes, sir.

Q. 108. Now, I repeat again: can you give us from your personal knowledge the value of the type of cucumber pickles I have described?

Mr. Davenport: Well, now, may it please the court —

The Court: Without referring to these letters at all.

Q. 109. Without referring to these letters at all, at South Deerfield, Massachusetts, on October 1st, 1923?

Mr. Davenport: May I call your attention to the fact that if he had had that knowledge he would not have written?

The Witness: I had that knowledge on our own transactions. I wished to make certain that was the general market.

The Court: So, independent of these letters, you are quite able to state the market value on October 1st?

The Witness: Yes, sir, I am.

The Court: Well, his testimony may stand, then.

Mr. Davenport: I assume that if it was \$10 a thousand that—

The Court: This witness has been in the business and he had general knowledge in his own books and recollection of market values.

Q. 110. The only reference you made to these two or three sheets that you secured was to corroborate your books?

A. That's it. I wrote simply to get corroboration of my own personal experience.

[fol. 109] The Court: Exclude the corroboration. The jury will not consider these letters other than to consider that this information was given by these letters.

Q. 111. And as I understand it, the price you stated of \$10 a thousand was from your own knowledge?

A. Yes, sir.

Q. 112. F. O. B., South Deerfield?

A. Yes.

Mr. Malone: You may inquire.

Recross-examination.

By Mr. Davenport:

X Q. 113. I notice that you dropped this; that you had destroyed your lists of a year ago; that you did not have lists of a year ago. Right, is it not?

A. No; your term of "lists" and mine is different.

X Q. 114. You did have lists a year ago of market quotations?

A. Well, if you are terming lists printed matter, I don't know how to answer it. You have twisted me all up on printed lists.

X Q. 115. I am using your lists. You had such lists?

A. We had typewritten quotations at that time, and may have had some printed ones at that time, but we don't keep them from year to year.

X Q. 116. So you did have them?

A. We had quotations at that time; certainly.

X Q. 117. That's all; thank you.

Mr. Malone: That's all, Mr. Parker.

THOMAS J. MOLUMPY (recalled).

Redirect examination resumed.

By Mr. Bryant:

Q. 74. In the exhibit that has been introduced marked "Exhibit A," it appears that in addition to purchasing the pickle factory and pickle stock—I read from the exhibit—"together with one Reo truck, one Ford truck, all vinegar, cooperage except 65 one-headed barrels on said premises, and equipment of every name, nature and description now on said premises and used by the party of the first part in connection with the operation of the pickle business of the said party of the first part." Will you state to the jury whether or not you examined the premises with reference—or, whether you were familiar with the [fol. 110] premises, or whether in any way you know anything as to what the equipment of every name, nature and description now on the premises—of what it consisted?

A. Yes; I did examine the equipment and the tanks.

Q. 75. Will you tell us as near as you can remember what was the equipment and machinery? Enumerate the different articles that you remember.

A. There was a number of large pickle tanks holding probably nine to ten thousand gallons.

Q. 76. Each?

A. Each, with a capacity of approximately 245 gallon barrels. There was pickle soakers used to process the pickles with—

The Court: Pickle what?

The Witness: Soakers.

Q. 77. Soakers used to soak the pickles.

A. There was a pickle sorting machine used to grade the pickles. There was an electric motor and pump used to pump the brine in the tanks. There was approximately 20 ton of coal and steam boiler. There was 92 barrels of white distilled vinegar. There was 100 or more 14 gallon kegs. There was a chopping machine and scoops and stencils and the like.

Q. 78. Any miscellaneous small tools?

A. Miscellaneous small tools used in the pickle business.

Q. 79. These small tools—fairly well equipped with small tools?

A. Fairly well equipped, I should say.

Q. 80. And did you inspect them?

A. I went through the factory and the tanks and made an inventory of the goods in the tanks and in the adjoining buildings. Besides that there was two trucks, a Reo Speed Wagon and a Ford ton truck.

Q. 81. Do you remember anything about a carrier there?

A. Yes; there was a carrier used to get the pickles from the tanks into the pickle house.

Q. 82. Describe this carrier briefly.

A. Why, it was made of iron something like a railroad track, and it had a large box which probably held three or four barrels of pickles that were used to convey the pickles from the pickle factory into the soakers.

Q. 83. Well, a box hung by chains?

[fol. 111] A. A box hung by chains, and it conveyed the pickles from the tanks into the pickle factory; into the soakers.

Q. 84. The process was to run over the tank?

A. To run over the tank.

Q. 85. And then do what? First, didn't you carry your box over your tank?

A. Drop it into the tanks, and when it was full of pickles it was raised out of the tanks by means of a windlass, and then the pickles were conveyed from the tank shed into the main pickle factory. And when it got into the pickle factory the bottom came out and the pickles were dropped into the soakers, and there they were processed and made any kind of pickles that they desired.

Q. 86. Taking the brine out of them?

A. Yes, taking the brine out of them.

Q. 87. Then they were taken from the soakers and go through process?

A. Yes.

Q. 88. Mr. Molunphy, how long have you been in the pickle business?

A. Since 1908; 16 years, approximately.

Q. 89. Are you familiar with the processes of the manufactured pickles?

A. Yes.

Q. 90. Are you familiar with pickle plants?

A. Yes; I think I am.

Q. 91. Have you had anything to do with the installation of appliances, etc., such as you have described in pickle plants?

A. Yes, I have.

Q. 92. Do you know anything about the value of those things?

A. Yes.

Q. 93. Are you able to make any estimate of the value of the equipment that was contained in that pickle plant of Mr. Swan's?

A. Yes.

Q. 94. Well, now, take the tanks first; that is a large item. Will you describe to the jury what these tanks were, how they were made?

A. Why, the tanks were made with a 10 foot stave, probably a 14 foot bottom; that is, the tanks were 14 feet in diameter and 10 feet high. They had eight to ten, or possibly more, hoops made of three-quarters or seven-eighths inch iron, and they had wooden covers made out of seven-eighths inch boards, and the staves were made out of inch and seven-eighths stock.

Q. 95. And staves seven or eight feet high?

A. The staves were, say, eight or 10 feet high.

Q. 96. How do you get at them from the ground? One witness said that he examined a lot of the pickles in the tank.

A. Oh, the tanks had a platform around each tank; a wooden platform around each tank, probably five feet from the ground. There was platforms around each tank.

Q. 97. So you could walk around them?

A. So you could walk around them and empty the pickles in from almost any side.

Q. 98. Now, how many tanks were there on these premises, if you know?

A. How many of these large tanks?

Q. 99. Yes.

A. Well, there were 24 or 26 large tanks. That is, what I call large; 245-barrel capacity tanks, besides a number of small.

Q. 100. Two hundred forty five?

A. What we call 245 gallon tanks; 45 gallon barrels — casks, rather.

Q. 101. They would hold 245 gallons?

A. Yes.

Q. 102. Any small ones?

A. Yes, there was. There was 20 or 25 small tanks that would hold probably 250 gallons.

Q. 103. Now, taking these larger tanks, what is the value of one of those tanks?

Mr. Davenport: I object.

The Court: When?

Mr. Bryant: On the first day of October, 1923.

The Court: Does it appear that he saw these tanks anywhere around that time?

Q. 104. When did you examine these tanks?

A. I have examined them in September, 1923.

Q. 105. What time in September?

A. I think it was the second week in September when we were negotiating the deal.

The Court: He may answer.

Mr. Davenport: Your Honor will save me the question?

The Court: Yes.

Q. 106. What was the value of these tanks?

A. When?

[fol. 113] Q. 107. At the time you examined them.

Mr. Davenport: That isn't the question.

Q. 108. When they were negotiating this deal with Mr. Swan.

A. I should say the value of those tanks to the best of my knowledge.

Mr. Davenport: Well, just a moment; it isn't the best of his knowledge; it is the fair market value.

The Court: Yes; that is what we want.

Q. 109. What in your opinion was the fair market value of those?

A. \$200 each.

Q. 110. Now, how do you get at that?

Mr. Davenport: Now I am going to object to that.

Mr. Bryant: Perhaps that is for cross-examination.

The Court: I think so.

Q. 111. You say they were worth \$200 each?

A. Yes.

Q. 112. You spoke of a lot of little tanks.

A. Those small tanks, probably \$10 each.

Q. 113. Well, now, you have spoken of a pickle sorting machine; what do you mean by a pickle sorting machine? Tell the jury what it is.

A. A pickle sorting machine is a machine to grade the different sizes of cucumbers. When pickles are sold on the market they are sold by the count. When they are sold in a large cask of 45 gallons they are sold in either 600 or 800 or 1,000 to a cask; and we have to grade those and sort them so as to get the right count.

Q. 114. You have to put all the pickles of the same size by themselves?

A. Yes; and we have machines that assist us in grading these pickles. It is a long machine. The pickles go in at one end, and it has an endless belt which carries the pickles down through the machine, and they are dropped down at different boxes, and the different sizes go out at different places.

Q. 115. The small sizes come out first?

A. The small sizes come out first, and the others drop out at the larger openings.

Q. 116. They had one of those sorting machines there?

A. Yes.

Q. 117. What is the fair market value of that sorting machine at that time?

A. \$50.

[fol. 114] Q. 118. You spoke about some soaker tanks. How many soaker tanks were there?

A. There were seven soaker tanks.

Q. 119. Of what shape were they?

A. There were some round ones and some oblong, of different capacities. Some of them held, I should judge, 10 or 12 or 15 barrels each.

Q. 120. And what were those soaker tanks worth? What was the fair market value of those soaker tanks at that time?

A. Why, there were some of them—

Mr. Davenport: Just answer the question.

Mr. Bryant: Well, let him. He is answering it.

Q. 121. Go on with your answer, Mr. Molunphy.

A. \$50 for some of them, and some of them were worth \$35.

Q. 122. In what way do you distinguish between 50 and 35?

A. Some of them were round and of larger capacity than others. There were four round vats that I should place the value of \$50 each. There were four smaller ones at \$35 each.

Q. 123. That is where you got the 50 and 35?

A. Yes, sir.

Q. 124. I understood you to say that there were seven soakers, and you just spoke of four round ones —

A. There were three round ones and four oblong ones.

Q. 125. Then there were seven?

A. Yes.

Q. 126. Four and three. A chopping machine you spoke of. What was that?

A. Why, that is a machine that is used to chop pickles to make relishes.

Q. 127. There was one of those machines?

A. There was one of those machines there.

Q. 128. What was the fair market value of that at that time?

A. \$150.

Q. 129. You spoke about a pump for pumping brine.

A. Yes.

Q. 130. Tell the jury what that was used for and how it was used.

A. Why, it was a brine pump especially constructed so that the metal parts would not corrode. I think it was made of bronze; driven by an electric motor. It was used to pump the brine from the bottom of the tanks so as to have the salt uniform in the tanks.

Q. 131. Pump the brine from the bottom of the tanks to where?

[fol. 115] A. To the top of the tanks. And generally if the salt in the solution is not circulated, the brine in the bottom will be stronger. The brine will be stronger at the bottom if it is not agitated; and most pickle plants have a

brine pump which they use to keep the brine even in the tanks; to keep the brine the same test on the top as it is on the bottom. And in this plant there was one of these pumps that was used to pump the brine from the bottom of the tanks up to the top of the tanks.

Q. 132. Do you put the pump itself in the tank?

A. No; you put the hose into the tank and it sucks the brine from the bottom into the top.

Q. 133. From the bottom into the top?

A. Yes, sir.

Q. 134. In other words, it works on one tank at a time?

A. Yes, on one tank at a time.

Q. 135. Well, what was the value of that machine?

A. \$100.

Q. 136. There was some white, grain vinegar; distilled vinegar?

A. Yes; to my recollection there were 92 barrels of what we call 100 grain, double strength, white, distilled vinegar in barrels.

Q. 137. And what is the quality of that vinegar?

A. It was manufactured by one of the leading vinegar manufacturers of the country; a first-class vinegar.

Q. 138. What was that a barrel or gallon, or how do you figure?

A. Vinegar of that nature—

Q. 139. At that time and at that place what was it worth?

A. It was worth 12 cents a gallon. There were 92 barrels which would average 47 gallons a barrel, and it was worth 12 cents a gallon; naked vinegar. There would be an additional charge of cooperage of \$3, and a charge for freight. It was worth 12 cents in the factory at New York.

Q. 140. Is vinegar necessary—not necessary, but is it used in the manufacturing processes of pickles?

A. Yes.

Q. 141. And in the shipping—

A. Yes; it is used in the making of pickles.

Q. 142. Now, you told us how much it was worth in New York, and about the cooperage and freight; will you tell us what that lot of vinegar was worth; the market price of that [fol. 116] vinegar at South Deerfield on the first day of October, 1923?

Mr. Davenport: I object to that.

The Court: He may answer.

Mr. Davenport: Will your Honor save me the question?

The Witness: It was worth \$949.06.

Q. 143. In giving the value of these tanks—you described the walkways around them. Did you include the value of those walkways in the value that you gave of the tanks?

A. No.

Q. 144. Very well. Then will you tell what these walkways were worth of the tanks? What is the fair market value of those?

A. The fair market value of the walkways around all of the tanks was \$450.

Q. 145. You spoke about the carrier system, but if I remember rightly you did not express an opinion as to the value of the carrier system. Will you kindly do so?

A. I should say it was worth \$750.

Q. 146. You spoke of some kegs; 100 or more small kegs; 14 gallon kegs. What were those worth?

A. They were worth \$1.10 apiece; \$110.

Q. 147. There were a number of small items that you mentioned; I will ask you whether there was any tumeric there? Is that the usual material used?

A. That is used in preparing the pickles; yes.

Q. 148. What is the value of the tumeric as it was there?

A. \$16.20. The tumeric was worth \$8—no; pardon me. The tumeric was worth \$16.20.

Q. 149. Have you given us the value of the scoops and miscellaneous small tools?

A. There was a few small tools that I didn't consider very valuable and I didn't put them down very much.

Q. 150. They use shovels and scoops in the plant and they wear out?

A. Yes.

Q. 151. Now we come down to two automobiles.

A. I valued the automobiles.

Q. 152. Have you any use for automobiles in your business?

[fol. 117] A. Oh, yes. We use several trucks and business cars in our business.

Q. 153. Are most of your deliveries made by automobile truck?

A. Practically all of our delivery is made by truck.

Q. 154. How far are you from a railroad station? From a freight station?

A. The freight station is practically three miles away.

Q. 155. How many cars and what type of cars do you use, particularly in the freighting department of your pickle business?

A. In the freighting department we have five trucks.

Q. 156. And what kinds are they?

A. We have two four-ton Republics; we have two Reo Speed Wagons—three Reo trucks.

Q. 156a. That is your present equipment?

A. Yes, sir.

Q. 157. Now, how long have you made use of your trucks for freighting?

A. Oh, for the last twelve years.

Q. 157a. Now, during that time have you had any Reo or Ford trucks?

A. Yes; we have had both Ford and Reo trucks.

Mr. Davenport: He said he had Reo Speed Wagons.

The Witness: A Reo Speed Wagon and a Reo truck.

Mr. Davenport: I know it. My brother don't.

Mr. Bryant: No, I am not as much of a motorist as you are.

Q. 158. Are you familiar with the values of automobiles used in this business?

A. Yes.

Q. 159. Did you examine the two trucks that are spoken of in this—the one Reo truck and one Ford truck? Did you examine those two machines?

A. I observed them when we took our inventory of the property.

Q. 160. Will you tell us what the fair market value of those two are?

Mr. Davenport: Now I object, may it please the court. This man hasn't shown that he knows anything about the value of cars.

The Court: I don't know as he has any qualifications as to the value of second-hand cars.

Q. 161. Are you familiar with the value of motor trucks?

A. Yes.

The Court: Second hand motor trucks.

[fol. 118] Q. 162. Are you familiar with the prices of new trucks?

A. Yes.

Q. 163. Are you familiar with the depreciation in the value of trucks caused by use and so forth?

A. Why, I—

Mr. Davenport: Answer it yes or no.

The Witness: Yes.

[No interrogatories numbered 164 to 166.]

Q. 167. Did you examine this Reo and this truck, this Ford that is, in question?

A. Yes.

Q. 168. Were you able to form any estimation as to the amount of depreciation in those trucks by reason of their use below the market price of them?

A. Yes.

Q. 169. Very well. Now, based upon that information of yours, will you tell us what the value of this Reo truck was and the value of the Ford truck?

Mr. Davenport: I object, may it please the court.

The Court: It may be answered.

Mr. Davenport: Will your Honor save me the question?

Q. 170. You may answer.

A. The value of the Ford truck which had been used two months was \$450.

Q. 171. And the Reo truck?

A. The Reo truck had been used a little over a year. The value was \$984.

Q. 172. I am not quite certain whether I included this or not. You spoke about the tanks having covers; all these tanks having covers.

A. Yes.

Q. 173. In your estimate of the value of the tanks, did you include the value of the covers, or do you make a separate estimate of the value of the covers?

A. In my appraisal of the tanks I included the tanks only.

Q. 174. Well, then, will you tell us if these covers had any value; what was the value of those covers?

A. The covers were worth \$10 apiece.

Q. 175. That is for the large tanks?

A. That is for the large tanks.

Q. 176. Did the small tanks have covers?

A. They had some, but I didn't place any value on them.

[Ten minute recess.]

[fol. 119] Q. 177. You spoke about some coal, Mr. Molumphy. Did you measure the coal? Did you determine accurately how much there was?

A. No; I estimated it.

Q. 178. You use coal?

A. I do; yes.

Q. 179. How much coal was there, approximately?

A. Twenty ton.

Q. 180. What was it worth at that time at South Deerfield?

A. \$200.

Q. 181. Now, there was one other item. In your testimony you spoke about an electric motor.

A. Yes.

Q. 182. What is the motor used for?

A. Why, it was used about the factory to run the machinery.

Q. And what is the value of that electric motor?

A. \$50.

Q. 184. Now, I will ask you one other question, Mr. Molumphy. You are thoroughly familiar—you inspected these buildings carefully in September, 1923—or 1924?

A. Yes.

Q. 185. Have you recently been about or near the premises?

A. I have been there twice since then.

Q. 186. And when was the last time you were there?

A. November, 1924.

Q. 187. And about what part of November?

A. The third week in November, 1924.

Q. 188. The third week in November?

A. Yes.

Q. 189. Do you know what day in the third week of November you were there?

A. It was the 24th of November.

Q. 190. The same day the appraisers were there?

A. No.

Q. 191. You were there some time in the third week in November?

Mr. Davenport: He says he was there the 24th.

Q. 192. Was there—will you state whether or not there was any noticeable change in the buildings from what there had been; from and between that time and the time you saw them in 1923?

A. There wasn't any change.

Mr. Bryant: You may inquire.

[fol. 120] Recross examination.

By Mr. Davenport:

X Q. 193. When were you there to look over this property?

A. I was there several times.

X Q. 194. When did you make this purported typewritten statement that you are looking at, or have been looking at?

A. Well, when we were first negotiating the deal I went through the property—

X Q. 195. When was that?

A. That was in September, 1923.

X Q. 196. Did you ever go to that property with the purchaser of this property—with the men that entered into his contract; Mr. Simmons?

A. Yes; Mr. Simmons and I looked over the property in September, 1923.

X Q. 197. Was Mr. Swan there?

A. I couldn't say whether he was or not.

X Q. 198. You were never there, were you, in September—

A. Yes.

X Q. 199. To look over this property?

A. Yes.

X Q. 200. You don't know whether Mr. Swan was there or not?

A. I couldn't say. We talked with Mr. Swan——

X Q. 201. You know you didn't go over the property with Mr. Swan?

Mr. Bryant: He hasn't said so.

Mr. Davenport: I say, he knows it.

Mr. Bryant. He hasn't said so. You say so. He hasn't said so. Now, find out.

Mr. Davenport: He can answer it.

Mr. Bryant: You are putting words in his mouth.

X Q. 202. You never went over this property with Mr. Swan?

A. I think Mr. Swan was with us——

X Q. 203. Answer the question.

Mr. Bryant: I appeal to the court.

The Court: Let's not take the time unnecessarily. Go ahead with the question.

X Q. 204. Now, when do you say you went over the property with Mr. Swan?

A. In September, 1923.

[fol. 121] X Q. 205. Did you make this list at that time?

A. No.

X Q. 206. When did you make this list?

A. When I went over the property——

X Q. 207. I didn't ask that. I asked you when.

A. I made part of this list when the deal fell through. When I knew we wasn't going to get the property.

X Q. 208. Do it that same day?

A. No.

X Q. 209. Well, then, will you tell me when you made this list?

A. Shortly after the deal fell through.

X Q. 210. You did not then go on the property to do it?

A. No; we had been on the property before.

X Q. 211. Well, I say, you did not go on the property?

A. I did go on the property in September, 1923.

X Q. 212. You didn't go on the property at the time you made this list?

A. Yes, I did.

X Q. 213. Oh, you did?

A. Yes, I did but I didn't carry out the prices until after the deal fell through.

X Q. 214. Now I come back and ask you when you made this list?

A. I made this list shortly after the deal fell through.

X Q. 215. And you made it from memory. You didn't go on the property after the deal fell through?

A. How could I make it otherwise than from memory? I made it after the deal fell through.

X Q. 216. You didn't go on the property after the deal fell through, did you?

A. Yes.

X Q. 217. How long after?

A. I was on the property in August 1924, and November, 1924.

X Q. 218. And that is when you made this list?

A. No.

X Q. 219. Make any part of it then?

A. I made this list—

X Q. 220. Wait a minute. Did you make any part of it in August, 1924?

A. No.

X Q. 221. Who was with you in August, 1924?

A. When?

X Q. 222. August, 1924. You said you went on there in August, 1924. I ask you who was with you?

A. I was alone.

X Q. 223. Did you see Mr. Swan?

A. I saw Mr. Swan in 1924; yes.

[fol. 122] X Q. 224. Did you see him on the property in August, 1924?

A. Not on the pickle property; no.

X Q. 225. You claim you looked it over in August, 1924?

A. Yes.

X Q. 226. Did you get inside?

A. I was on the premises.

X Q. 227. Answer the question.

A. Inside where?

X Q. 228. Inside the buildings?

A. In the tank sheds; yes.

X Q. 229. Well, that is outside, isn't it? That is simply a shed?

A. That is a shed.

X Q. 230. Open?

A. Yes.

X Q. 231. Did you get inside of the buildings, I asked you?

A. Which buildings?

X Q. 232. Well, any of the buildings outside of those which were open like sheds?

A. I was in the sheds. That was all I was in.

X Q. 233. Day or night?

A. Sir?

X Q. 234. Day or night?

A. Day.

X Q. 235. You did not then see Mr. Swan there?

A. I saw Mr. Swan that day; yes.

X Q. 236. You met Mr. Swan here in Springfield, did you not?

A. When?

X Q. 237. Oh, this last summer.

A. Yes.

X Q. 238. Came down here at your request?

A. We met in Springfield.

X Q. 239. Had a lunch with him at the Highland Hotel?

A. No, I didn't have lunch.

X Q. 240. Well, you met at the Highland?

A. No.

X Q. 241. Where did you meet?

A. On the street.

X Q. 242. On the street?

A. Yes.

X Q. 243. Together for how long?

A. Oh, half or three-quarters of an hour.

X Q. 244. Did you meet Mr. Swan at South Deerfield shortly before you met him at Springfield?

A. Yes.

X Q. 245. Did you ask Mr. Swan this question: "Will you sell out this property here at the same price that you were to sell it last fall?"

A. No.

[fol 123] X Q. 246. Did you ask him anything of that kind?

A. Yes.

X Q. 247. Did you ask him if he would sell the property?

A. I don't know as I asked him a definite question like that; no.

X Q. 248. Did he tell you that he would sell it at just the same price that you were to take it last fall provided you kept Mr. Gould out of it?

A. No.

X Q. 249. And as a result of the conversation that you had with him did you and Mr. Simmons meet Mr. Swan in Springfield at your request?

A. I met Mr. Swan in Springfield.

X Q. 250. Yes. And wasn't the matter there talked over with him that he would sell the property to you for exactly the same price it was last year if you kept Mr. Gould out of it?

A. No.

X Q. 251. Anything to that effect?

A. We didn't get that far.

X Q. 252. You didn't get that far?

A. No.

X Q. 253. You got far enough to get the price, didn't you?

A. No.

X Q. 254. Didn't he tell you that he would sell it at the same price?

A. No.

X Q. 255. Nothing of the kind?

A. No.

X Q. 256. You were talking about it, weren't you?

A. I was feeling him out.

Mr. Bryant: If you Honor please, I don't see how this is legitimate cross examination.

The Court: Only as bearing upon the value.

X Q. 257. Feeling him out on the question of a purchase? Will you answer it?

A. Did you ask me a question?

X Q. 258. Feeling him out on the question of purchase?

A. I was anxious to know if he was still willing to sell.

X Q. 259. And you found out?

A. No, I didn't.

X Q. 260. You were looking for it still for Mr. Simmons?

A. I don't understand your question.

X Q. 261. Your object in talking to him was for Mr. Simmons?

A. No.

X Q. 262. Well, then, I will come back again; you met him alone at South Deerfield?

A. Yes.

X Q. 263. Was your arrangement to meet him in Springfield [fol. 124] field with Mr. Simmons made that day or was it made later?

A. It wasn't made that day; no.

X Q. 264. Did you later make arrangements with him that he should meet you and Mr. Simmons in Springfield?

A. Yes.

X Q. 265. And you met in Springfield?

A. Yes.

X Q. 266. And your object was to see if he would sell out? Is that right?

A. Yes.

X Q. 267. Now, are you a dealer in second-hand automobiles?

A. Dealer? Oh, no.

X Q. 268. What was the age of these twenty-six tanks that you say were there?

A. I should judge they were 15 years old.

X Q. 269. Have you been in the pickle business long enough to know how long a tank will last?

A. Yes.

X Q. 270. These tanks are in an excavation made in the ground, are they not?

A. No, no; they are on top of the ground.

X Q. 271. They are on top of the ground?

A. Yes.

X Q. 272. Stand up on legs?

A. They are set on sleepers.

X Q. 273. So that there is an air space between the ground and the bottom of the tank?

A. Yes.

X Q. 274. You would say that all of the tanks were at least 15 years old?

A. Yes, about that.

X Q. 275. Would you say that perhaps some of them were 20 years old?

A. I should say they were 15 years old.

X Q. 276. You would say they were a good age, wouldn't you?

A. Well, comparatively young.

X Q. 277. Your particular work for the pickle company is what?

A. Why, I am an inside man part of the time assisting in the manufacture of the pickles, and part of the time I am on the outside; salesman.

X Q. 278. You have charge of the bookkeeping department?

A. No.

X Q. 279. Have you the records here of the purchases which you made of pickles last fall in that vicinity?

A. Purchases we made where?

X Q. 280. South Deerfield.

A. No.

X Q. 281. Did you make any purchases yourself, or did [fol. 125] you know of purchases by the pickle company of pickles at South Deerfield in brine—or not—without any brine?

A. When do you mean?

X Q. 282. In 1923, about the first of October?

A. I know we bought some.

X Q. 283. And the price paid for them was \$3.50 a thousand?

A. Oh, no, no.

X Q. 284. How much was it?

A. The pickles that we bought in—

X Q. 285. I am talking about those that you bought in South Deerfield, in brine; not the ones you bought of Mr. Swan.

A. They were \$5.50 a thousand. Those are the ones that we bought—

X Q. 286. Just a minute. You have answered my question.

Mr. Bryant: He is going to explain what pickles they were.

X Q. 287. Wait a moment. They were vat run?

A. What do you mean by vat run?

X Q. 288. Well, just as they came from the brine?

A. From the brine? All pickles come from the brine if they are salt pickles.

X Q. 289. Well, I am talking about those that you paid \$5.50 for. They came from the brine?

A. They were the last picking.

X Q. 290. I am not asking you if they were the last picking or the first. They were in brine, weren't they?

A. Yes, they were in brine.

X Q. 291. They were in the same kind of brine, perhaps of a little difference in strength, as to those which Swan's were in? Am I right?

A. They were brine pickles.

X Q. 292. No different from the Swan pickles in brine?

A. They were different.

Mr. Bryant: As far as the brine was concerned?

X Q. 293. As far as the brine was concerned?

A. As far as the brine was concerned, probably the brine was the same.

X Q. 294. Well, what I am trying to get at, they would be taken from the same kind of stuff as the Swan pickles?

A. There isn't very much difference in the brine.

[fol. 126] X Q. 295. Did you happen to see those pickles that were purchased at five and a half?

A. Yes, sir, I did.

X Q. 296. They were pickles that came from the farmers around about just the same as the Swan pickles were?

A. I presume they were grown by the farmers in that vicinity.

X Q. 297. You don't know that? They may have been imported from Chicago? Is that right? I say, the pickles that you got for five fifty may have been imported from Chicago?

A. I wasn't interested. I knew they were brine pickles.

X Q. 298. You said that there were 92 barrels of vinegar up there. When did you find those 92 barrels of vinegar?

A. They were in——

X Q. 299. When, I said, not where.

A. When what?

X Q. 300. When did you find those 92 barrels of vinegar?

A. I don't know, as I never found them.

X Q. 301. You never saw them, did you?

A. Yes.

X Q. 302. When did you see them?

A. In September, 1923.

X Q. 303. You say that there was more than nine barrels of vinegar at that place in September, 1923?

A. Ninety-two.

X Q. 304. Ninety-two?

A. Yes.

X Q. 305. And you have added the "two" for luck, or something of that sort?

Mr. Bryant: I object, if your Honor please.

X Q. 306. You say you saw 92 barrels of vinegar there in September, do you?

A. Yes.

X Q. 307. Did you make a memorandum of that at the time?

A. Yes.

X Q. 308. Where is the memorandum?

A. Here is one here [showing].

X Q. 309. Oh, that is your typewritten one. You didn't type it at the time, did you?

A. No.

X Q. 310. Where is your original memorandum concerning it? Destroy it?

A. No.

X Q. 311. Have you got it?

A. I haven't got it here.

X Q. 312. This thing that you are testifying to then is [fol. 127] something that has been copied? This typewritten sheet has been copied from something else?

A. Yes.

X Q. 313. You didn't copy it?

A. Yes.

X Q. 314. Did you do the typewriting?

A. No; my bookkeeper did the typewriting.

X Q. 315. Then you didn't keep it, did you?

A. [No response.]

X Q. 316. Now, you bought some pickles in Northfield out of brine on or about the first of October for three fifty?

A. For how much?

X Q. 317. Three fifty.

A. You are telling me news.

X Q. 318. What's that?

A. You are telling me news.

X Q. 319. You heard Mr. Simmons telling about three fifty for pickles yesterday?

A. No, I did not.

X Q. 320. Oh, you didn't hear that?

A. No.

X Q. 321. Do you know whether you did or didn't buy some pickles out of brine—

A. I know that I didn't.

X Q. 322. At Northfield at three fifty?

A. I know we didn't.

X Q. 323. You didn't buy what was known as second pickles then out of brine? When I say "you", I mean the concern.

A. Not in October or September, 1923; no, we did not.

X Q. 324. Didn't do anything of that kind?

A. No; not to my knowledge.

[No interrogatory numbered 325.]

Redirect examination.

By Mr. Bryant:

Q. 326. Mr. Molumphy, he has spoken about your buying some pickles in brine in Greenfield—in Deerfield. He has also spoken about buying in Northfield. I don't know about Northfield. You bought some in South Deerfield?

A. Yes.

Q. 327. And what kind of stock did you buy?

A. They were the last picking of cucumbers which contained quite a big proportion of nubs and crooks.

Q. 328. And did you see those that you bought?

A. Yes.

Q. 329. And they contained a large proportion of nubs and crooked pickles?

A. Yes. They were the last picking.

Q. 330. And you paid for those five fifty?

A. Five fifty a thousand.

[Vol. 128.] Q. 331. Now, one more question: Are those known to the trade as first class, or not first class?

A. They are not known as first class; no.

Q. 332. You have had other dealings with Mr. Swan at other times?

A. Oh, yes.

Q. 333. A good many of them?

A. Not a good many.

Q. 334. Does Swan deal in the kind of pickles that you bought at South Deerfield at the time that we have been speaking of?

A. I don't quite get your question.

Q. 335. Did you buy those of Swan?

A. No.

Q. 336. You bought them of another dealer there?

A. Another pickle man.

Q. 337. Well, does Swan deal in the kind that you bought of this other man; the nubs and crooks?

A. As a general thing Mr. Swan packs a better grade of pickles.

Q. 338. What is the man's name that you bought them of?

A. The man's name is Jewett.

Q. 339. Did you buy any first class pickles of Mr. Jewett?

A. He wouldn't sell them to us.

Q. 340. Answer my question.

A. No.

Q. 341. Why not?

A. He wouldn't sell them to us.

Q. 342. He wanted them for his own trade?

A. Yes.

Q. 343. Is that the only reason that he gave to you?

A. The only thing that he offered us was the last tanks that he had picked, and we had to buy them.

Q. 344. And they were full of nubs?

A. They were the last picking, and there were a lot of nubs and crooks in them.

Q. 345. If you know, will you tell us what the character of the last picking is as compared with the character of early picking?

Mr. Davenport: Just a moment. That all depends upon the season, may it please the court.

The Court: It seems to me that we have got this in and we don't need any more.

Q. 346. One question I want to ask you about the vinegar business: Where was that vinegar?

A. It was in the basement of this tenement house.
[fol. 129] Q. 347. In the basement of the tenement house.
Did you count the barrels of vinegar?

A. Yes.

Q. 348. And who was with you when you counted them?

A. Mr. Simmons.

Q. 349. And how many barrels of vinegar did you count?

A. Ninety two.

Q. 350. As a matter of curiosity, did you see the invoice of the vinegar?

A. No. I didn't see the invoice of the vinegar.

Mr. Bryant: I think that's all.

Recross examination.

By Mr. Davenport:

X. Q. 351. Perhaps we can get this straightened out after a time. Did you go around and tap the heads of those barrels to see whether they were empty or not?

A. No.

X. Q. 352. So all you saw was 90 barrels?

A. I saw 92 barrels. I know there was vinegar in some of them. I didn't examine all of them.

X. Q. 353. Did you see those 65 one-headed barrels on the premises?

A. No, I didn't.

X. Q. 354. Perhaps we had better get a little better acquainted with this pickle business from you. These pickles which you received from Mr. Jewett were what were known as farm run pickles? They hadn't been assorted?

A. They hadn't been assorted; no.

X. Q. 355. They were just as they had come in from the farms?

A. Yes.

X. Q. 356. Just as they went into the tanks or vats, or whatever you call them?

A. Yes.

X. Q. 357. Now, every tank of pickles of that description coming from the farms contains some nubs, contains some crooks, and contains some that they call bloaters; is that right?

A. Well, it depends upon how you buy them. If you buy them that way, you get them that way. If you refuse to take them that way, you don't get them that way.

X Q. 358. If they buy them as farm pickles?

A. If they bought them that way, they would get them that way.

[fol. 130] X Q. 359. And they did accept them that way, didn't they?

A. [No response.]

X Q. 360. Is it a bloater or floater? What is it that you call them?

A. Some call them blonters and some call them floaters.

X Q. 361. Well, a bloater you can't tell anything about until after you get ready to assort the pickles, can you?

A. Well, in processing pickles—

X Q. 362. Wait a minute.

Mr. Bryant. Let him answer your question.

Mr. Davenport. I would if he would answer it to the point. Will you read the question?

[Previous question read by stenographer as follows:]

"X Q. 361. Well, a bloater you can't tell anything about until after you get ready to assort the pickles, can you?"

X Q. 363. Answer it yes or no.

A. The sorting hasn't anything to do with it.

X Q. 364. Well, then, I will ask you another question: When is the first time after a pickle goes into the brine that you can find the floater or bloater?

A. You may never find it.

X Q. 365. When is the first time that they do find it?

A. If you leave your pickles in the salt brine indefinitely, you never know whether it is a floater or a bloater or a straight or what it is.

X Q. 366. That is just what I am getting at. They stay in their place while in the brine?

A. Yes.

X Q. 367. But when they are assorted that is when you discover them?

A. No.

X Q. 368. When do you discover them, then?

A. After they are processed.

X Q. 369. What do you mean "after they are processed"?

A. After the salt has been extracted from the pickles.

X Q. 370. And how do you discover it?

A. Why, by the general appearance of the pickle.

X Q. 371. Is it put in water or what?

A. When you process the pickles you have to put them in water. Most pickle men put them in hot water for several days, and there are more or less pickles that don't come up, as a pickle man would call it, and they will stay [fol. 131] flat; and after they have been processed and after they have been in this water for a certain number of hours, then is the time you can tell whether they are floaters or a straight pickle.

X Q. 372. Well, how can you tell?

A. By the general appearance of the pickle.

X Q. 373. General appearance or because it stays at the top or bottom?

A. That hasn't anything to do with it.

X Q. 374. The general appearance of the pickle?

A. Yes.

X Q. 375. And that doesn't come out until they are processed?

A. Until they are processed.

X Q. 376. So that every tank of pickles in the brine contains these floaters or bloaters?

A. Always more or less floaters in pickles.

X Q. 377. Did you make any examination of these pickles of Swan's before they were purchased?

A. Yes.

X Q. 378. Did you see—you saw that they were the farm-run pickles?

A. I saw that they were good pickles.

X Q. 379. Farm-run?

A. I saw they were good pickles.

X Q. 380. Farm-run?

A. I don't understand that expression.

X Q. 381. Well, as they were delivered from the farmers. They hadn't been assorted in any way?

A. No, they hadn't been assorted.

X Q. 382. Are you familiar with the percentage of crooks and nubs that usually get into farm-run or to pickles that are brought in from the farmers?

A. There is no way of telling.

X Q. 383. There is no way of telling?

A. Yes.

X Q. 384. But they do creep in?

A. Yes.

X Q. 385. The best you can do?

A. Yes.

X Q. 386. And they run from 8 to 10 per cent each, don't they?

A. I wouldn't say that.

X Q. 387. Well, what would you say the percentage was?

A. There is no way of telling what the percentage of nubs or crooks—

X Q. 388. Well, give us your judgment from your experience in the matter as to what percentage would be crooks and what percentage would be nubs.

Mr. Bryant: Under what circumstances? Buying [fol. 132] farmers' crops with the understanding that they shall not put in any crooks?

X Q. 389. Buying the farmers' assorted crops?

A. There would be a very, very small percentage of nubs and crooks.

X Q. 390. Just put it in figures so we can tell.

A. I couldn't put it in figures.

X Q. 391. What's that?

A. I couldn't put it in figures.

X Q. 392. Well, would you say it was five per cent?

Mr. Bryant: Do you want him to guess at it?

Mr. Davenport: Oh, he knows.

Mr. Bryant: He says he couldn't tell you.

The Witness: I couldn't tell you.

X Q. 393. Are you familiar with both Swan and Jewett's line of business?

A. Yes; in a general way.

X Q. 394. They conduct their business along practically the same line in their purchase from the farmers?

A. No; I wouldn't say so.

X Q. 395. You wouldn't say so?

A. No. Every pickle man has a different way of buying his stock.

X Q. 396. What they do is to go out and tell the farmer they will give him so much a thousand for his pickles, and they deliver them?

A. No.

X Q. 397. That isn't so?

A. No, that is not so.

 Dedirect examination.

 By Mr. Bryant:

Q. 398. In your testimony you say that some stock was bought from Mr. Jewett, I think it was, in 1923?

A. Yes.

Q. 399. And you stated that that was the last run of pickles?

A. Yes.

Q. 400. When was that bought?

A. That was bought in October, 1923.

Q. 401. When?

A. In October, 1923.

Q. 402. And do you know what time in October?

A. Pardon me. In September, 1923.

Q. 403. Have you any way of fixing the exact date when [fol. 133] it was bought?

A. No. I know it was about in the middle of September.

Q. 404. Perhaps I can refresh your recollection a little. You knew at the time—did or did you not know, at the time it was made, of the making of the contract by Mr. Simmons with Mr. Swan?

A. Well, it was at the time we were negotiating the deal.

Q. 405. It was the time you were negotiating the deal?

A. Yes.

Q. 406. Was it before or after the contract with Swan was specifically signed? If you don't know, perhaps I can show it by somebody else. I will remind you that you were in South Deerfield there with Mr. Swan at one time, were you not, in September, 1923?

A. Yes.

Q. 407. Did you negotiate this with Mr. Swan?

A. Mr. Jewett?

Q. 408. Mr. Jewett.

A. Mr. Arthur Gould and I negotiated this deal with Mr. Jewett. We bought the pickles.

Q. 409. Now, did you at the time that you and Mr. Arthur Gould were negotiating with Mr. Jewett say Mr. Simmons is negotiating—

A. Mr. Simmons was in town that same day. We came up together. Mr. Simmons was over to Mr. Swan's, and Mr. Arthur Gould and I went to Mr. Jewett's and bought these—

Q. 410. And bought these pickles?

A. And bought these pickles. It was the same day.

Q. 411. It was either the day of the contract or previous to the making of the contract?

A. Yes.

Q. 412. And the contract was made on the 13th. So that the purchase from Jewett's was made either on the 13th or prior to the 13th?

A. Yes, I think it was on the 13th.

Q. 413. Now, one other question. You saw the pickles that were bought from Mr. Swan, you say?

A. Yes.

Q. 414. Now, you saw the pickles that were bought from Mr. Jewett?

A. Yes.

Q. 415. You saw the pickles that were bought from Mr. Jewett. You examined them before you bought them, did you?

A. Yes, sir.

Q. 416. Was the character or type of pickles that you [fol. 134] bought from Mr. Swan the same as you bought from Mr. Jewett delivered to you? Were they the same kind of pickles as to sort and size and freedom from nubs and crooks? Were they the same kind as those you bargained for from Mr. Swan?

A. They were not the same kind.

The Court: He has testified to that effect more than once.

Q. 417. Inferior or superior?

A. The Jewett pickles were very inferior.

Mr. Bryant: I think that is all I have to ask you, Mr. Molumphy.

Recross examination.

By Mr. Davenport:

X Q. 418. You have done some business, you say, with Mr. Swan?

A. Yes, sir.

X Q. 419. Is he fairly skillful in the conduct of his business?

A. Well, I wouldn't want to judge as to his skillfulness.

Mr. Davenport: Well, then, let it go at that. That is all.

Mr. Bryant: I think that we will rest.

Mr. Davenport: I want to renew our motion without resting.

[Rather lengthy discussion of counsel at right of bench which discussion the stenographer was instructed by the court not to report.]

Mr. Bryant: I desire to make a motion that it seems my duty to make; that the "rest" be erased and that I may be allowed to offer some evidence that I previously knew nothing about until this noon. I don't hesitate to tell you what it was.

[Discussion of counsel, off the record.]

I want to make a formal motion to make an offer on the refusal to give us that deed until Mr. Swan came. They refused to give it to us.

The Court: They were under no obligation to give it to you at that time. I don't think I will reopen the case. I will submit it to the jury.

Mr. Bryant: Will your Honor give me the benefit of an exception?

The Court: Yes. Now go ahead, Mr. Davenport, unless you want to renew your motion. Exception is saved, for the record.

[fol. 135] EVIDENCE FOR DEFENDANT

[Defendant's opening by Mr. Davenport.]

EDWARD P. SWAN (SWORN).

By Mr. Davenport:

Q. 1. What is your full name?

A. Edward P. Swan.

Q. 2. Where do you live, Mr. Swan?

A. South Deerfield.

Q. 3. How long have you lived in South Deerfield?

A. Forty-two years.

Q. 4. What is your business?

A. Pickle business.

Q. 5. And how long have you been in the pickle business?

A. Twenty-seven years.

Q. 6. The same location during that time?

A. Practically.

Q. 7. Now, on the first day of October, 1923—you received on September 28th this letter marked "Defendant's Exhibit 1"—or later than September 28th?

A. Yes, sir.

Q. 8. On October 1st will you tell what you did?

A. Yes, sir. I came to Springfield. I went to Westfield—telephoned from Westfield to Mr. Fairhurst that I would be up there by three o'clock. When I got home I inquired of Mr. Gould—

Q. 9. Well, you can't tell—when you got home you learned something at South Deerfield?

A. I learned something.

Q. 10. All right. Then where did you go?

A. I went to Greenfield, to Davenport & Fairhurst office.

Q. 11. Now between Northampton and South Deerfield did anything happen?

A. There were trucks across the road by Laurel Park which held me up for about some fifteen minutes—I don't know how long.

Q. 12. What time did you get into the office of Davenport & Fairhurst?

A. I know when I left South Deerfield.

Q. 13. When did you leave South Deerfield?

A. I left South Deerfield just the time——

Q. 14. No. What time was it?

A. Three forty five.

Q. 15. And what is the distance between Greenfield and South Deerfield?

A. Eight miles.

[fol. 136] Q. 16. And what time did you say you got to Greenfield? Did you go straight to the office of Davenport & Fairhurst?

A. Yes, sir.

Q. 17. What time did you get there?

A. Right around four fifteen.

Q. 18. Now, when you got to the office who was there?

A. Well, Mr. Fairhurst was there with my papers. My wife signed the deed and she went down and waited in the automobile, and we went in the other room where Mr. Gould and Mr. Simmons and Mr. Molumphy were.

Q. 19. What was done with the papers?

A. Mr. Fairhurst had the papers.

Q. 20. Did he go in the other room with you?

A. Yes.

Q. 21. Now, what was done after you got in the other room?

A. Well, I told Mr. Gould that I was very much hurt to think that he would write me a letter after the bargain was entered into saying that he would give me the greater part of this money in cash providing I would make it an object. I told him I knew what a demand note was and that as long as he felt that way that I should demand payment on the notes after I received possession of them.

Q. 22. Well, what took place after that?

A. Well, the conversation was mostly between Mr. Gould and Molumphy and Simmons. One said: "Well, if there is going to be any trouble or dissatisfaction about this, we would rather not put the deal through; not finish the deal." And they wanted to know if I wouldn't change my decision and allow them six months or something like that. I don't know how long, but a time to pay the notes. And after a long discussion there they went in the other room.

Q. 23. What did you tell them?

A. I told them "No".

Q. 24. Yes.

A. And after a long discussion of probably a half an hour they went into the other room with their lawyer, Mr. Lawler; and they were in there quite some time. I don't know how long. They came back and Mr. Gould, I think, said: "Well, we have decided to go through with this agreement." I said: "That's all right. I am ready, and [fol. 137] all I want is my money." Mr. Gould says: "I have got it." And he put his hand in his pocket and pulled out a check. I spoke to Mr. Fairhurst. I said: "Mr. Fairhurst, am I obliged to take a check in payment?" And before he could answer me Mr. Lawler said "Yes". And I said to Mr. Lawler: "I am asking Mr. Fairhurst." And Mr. Fairhurst answered "No", that I was not obliged to take a check in payment. Mr. Simmons said if I didn't want to accept that check—asked me if I would accept his check, and I said "No". I stayed there possibly three or four minutes or so and left the office.

Q. 25. Did you at any time have the check in your hand so that you knew what it was?

A. No, sir.

Q. 26. Or were you at any time told what it was?

A. No, sir.

Q. 27. Have you recalled all that you can recall as to what happened there?

A. Well, I remember Mr. Molumphy saying something that Gould had balled the deal; something like the Carty deal; the Carty matter.

Q. 28. Anything else that you recall?

A. Well, they were very anxious for me—

Q. 29. No. What was said? Well, I will refresh your recollection. Was there anything done or said relative to the papers?

A. Oh, yes. The papers were tendered—I tendered the papers and they tendered their papers to me.

Q. 30. What papers did you tender?

A. I tendered the deed of the real estate and the bill of sale of the personal property.

Q. 31. What papers did they tender to you?

A. They tendered me the two notes. It might be that that check was with it; probably so.

Q. 32. And the mortgages?

A. Yes, sir.

Q. 33. They tendered all the papers called for under the contract?

A. Yes, sir.

Q. 34. Now, Mr. Swan, what was the fair market value of those pickles in brine at your place on the first day of October, 1923?

Mr. Bryant: Have you qualified him at all?

Mr. Davenport: Do you want me to qualify him?

Mr. Bryant: Yes.

Mr. Davenport: All right.

[fol. 138] Q. 35. How long have you dealt in pickles, Mr. Swan?

The Court: Can't he testify?

Mr. Davenport: Well, I was taking my brother's suggestion.

The Court: It will save time.

Mr. Davenport: No question about that.

Q. 36. What was the fair market value, Mr. Swan, on the first day of October per thousand in the brine there?

A. The pickles as they were in the vats just as they came from the farm, \$4 is the fair market value.

Q. 37. How many barrels of vinegar were there there?

A. Not more than nine—nine or—eight or nine. Possibly nine; not over that.

Q. 38. What did those nine barrels consist of? That is, when did you get them?

A. The last car of vinegar I bought came in February, 1923, and I used on that car of vinegar until all my pickles were put in vinegar, leaving the vinegar that I didn't use of possibly eight or nine barrels.

Q. 39. Were there empty barrels in the basement under the house?

A. Yes, sir.

Q. 40. But only eight or nine full barrels?

A. That's all.

Q. 41. Now, what was the fair market value of the real estate exclusive of the tanks, the plank platforms around the tanks and the carrier and the sorter and the cutter?

A. Well, they were all lumped in together.

Q. 42. They were?

A. Yes, sir.

Q. 43. The fixtures and the realty.

A. The price——

Q. 44. Not the price, but what was the fair market value? Well, then, I will put it this way: What was the fair market value of all the property covered by the contract?

A. I was very satisfied to get \$15,000.——

Q. 45. No; I want you to give me the fair market value of the real estate first.

A. Of the——

Q. 46. Well, we will say, the house and lot?

A. Four-tenement house?

Q. 47. Yes.

A. I got \$30 a month——

[fol 139] Q. 48. No; what is the fair market value of it?

A. Well, \$3,500.

Q. 49. What is the fair market value of the pickle shed and the——by the way, what is under the pickle shed?

A. Tanks.

Q. 50. What is the fair market value of the pickle shed without the tanks?

A. The pickle sheds?

Q. 51. Yes.

A. Just covering the tanks?

Q. 52. Yes.

A. They are open sheds; posts in the ground and just a roof over them. Well,—six or seven hundred.

Q. 53. The fair market value of the pickle house or the building with the machinery and equipment in it?

A. The pickle house is a post barn also; tobacco barn—was used for a tobacco barn; 90 by 30. I would imagine \$1,500.

Q. 54. How many tanks were there there?

A. There were 25 vats.

Q. 55. They are called vats instead of tanks?

A. Well, vats or tanks.

Q. 56. Those were the large or small?

A. Those were the large.

Q. 57. How many small ones?

A. Well, not many. A few under the shed. They were old cocoanut oil barrels.

Q. 58. The small vats were old cocoanut oil barrels?

A. Yes. I have had them a long while.

Q. 59. What was the fair market value of the small tanks each?

A. Very little.

Q. 60. Well, put it in dollars and cents.

A. I don't know how many there are.

Q. 61. I didn't ask you that. How much apiece?

A. I would say \$100.

Q. 62. The large vats; what is the fair market value of those?

A. Some of them I have had—they have had pickles in them for 30 years. Some I bought second-handed and some I built new.

Q. 63. Well, what would be a fair average market value for a price right through as a unit?

A. I should say, \$50—if you could get it.

[fol. 140] Q. 64. What's that?

A. \$50 would be a fair market price if you could get a buyer.

Mr. Malone: Fifty apiece?

The Witness: Yes, sir.

Q. 65. What did the new ones cost you that you built there, apiece?

Mr. Bryant: I object to that, if your Honor please.

The Court: I don't believe that is going to help us very much.

Mr. Davenport: Well, I think that is so.

Q. 66. What would be a fair market value of the cartner, Mr. Swan?

A. Well, it cost about—

Q. 67. No. What is the fair market value of it, supposing somebody wanted to buy it separate and apart from the rest of the stuff?

A. Thirty or forty dollars.

Q. 68. The cutter.

A. It was not in shape to use. Had not used it for years. It hadn't much value.

Q. 69. I don't care about that, but what was its value?

A. Not very much value.

Q. 70. Put it in dollars and cents.

A. \$10.

Q. 71. The sorting machine. The fair market value of that?

A. It cost \$110——

Q. 72. You mean it is worth \$110?

A. It cost that.

Q. 73. No. What was it worth on the first day of October, 1923? All my questions are applicable to the first of October, 1923?

A. \$50.

Q. 74. Electric motor and pump?

A. I think \$50.

Q. 75. Twenty tons of coal?

A. About \$8 a ton; \$160.

Q. 76. One hundred kegs?

A. \$110.

Q. 77. Scoops and stencils?

A. Stencils and scoop. Very little value.

Q. 78. Well, put it in dollars and cents.

A. The value to me or somebody else——

Q. 79. No; the fair market value on the question of money.

A. My stencils were not valuable to anybody else.

Q. 80. Do they bear your name?

A. Yes, sir.

Q. 81. The E. P. Swan Company?

A. Yes, sir.

[fol. 141] Q. 82. So they would be no good to anyone else?

A. I wouldn't think so. There are some others. There are some of my customer's stencils, but those don't really belong to me.

Q. 83. So, so far as the stencils go they are of no value?

A. I wouldn't think to anybody else.

Q. 84. What are the scoops?

A. You have a circle on a handle with a net on it, and you dip out the pickles out of the brine.

Q. 85. And how many of these were there?

A. I imagine we had two or three around there.

Q. 86. How much were they worth apiece? The fair market value the 1st of October last year?

A. Oh, I imagine a dollar apiece.

Q. 87. What was the Reo Speed Wagon? What was the fair market value of that at that time?

A. I don't know.

Q. 88. Well, give us your judgment about it.

A. I imagine it was worth six or seven hundred dollars.

Q. 89. The Ford ton truck?

A. I would think from 300 to 350 dollars.

Q. 90. Well, I don't know whether I have covered everything that you had there or not. Mr. Swan, what kind of pickles were these that were in the tanks?

A. Vat run, just as they came from the farmers.

Q. 91. "Just as they came from the farmers" means what, in simple English?

A. Either field run or vat run is the same thing. As they come from the field; not assorted, to put into the tanks and brined.

Q. 92. How will they run as to crooks—how did these pickles run as to crooks—

A. And nubs?

Q. 93. And nubs?

A. Well, there are always nubs and crooks in all packing.

Q. 94. Well, I say, about in what percentage as they come from the farm and go into brine?

A. I can't give you a definite—

Q. 95. Well, approximate?

A. Well, bloats, nubs—

Q. 96. No; just nubs and crooks.

A. There is spotted stuff that goes in with nubs and crooks. Ten per cent would not be any too high.

[fol. 142] Q. 97. Now, about what percentage afterwards develop to be floaters?

A. I would imagine that more than ten per cent.

Q. 98. More than ten per cent are floaters?

A. Or around ten per cent.

Q. 99. When do you discover the floater?

A. When we process them. When we put them on the bench to assort is the time we notice them.

Q. 100. When you are assorting them to put in casks?

A. No; into barrels.

Q. 101. When you are assorting them to put into barrels?

A. Yes, sir.

Q. 102. And that is a considerable time after they are taken from the brine?

A. From the time we begin processing until we are through.

Q. 103. Now, Mr. Simmons saw this crop and inspected it?

A. Mr. Simmons saw the pickles in the vats; yes, sir.

Q. 104. Well, that's what I mean. He saw them in the vats?

A. Yes, sir.

Q. 105. And inspected them?

A. He saw the pickles in the vats. I suppose that he inspected them.

Q. 106. Well, did he take samples of them?

A. Not to my knowledge.

Q. 107. Or did he take samples of the brine?

A. We tested one or two vats.

Q. 108. What grade of pickles were these? Well, I guess you said they were farm run.

A. Field run or vat run. They are the same thing.

Q. 109. Now, two gentlemen say that the market for pickles in South Deerfield is fixed in Chicago. Is that true?

A. Not to my knowledge.

Q. 110. Had you ever had the market value of pickles that you processed in South Deerfield fixed in any other locality?

A. No, sir.

Q. 111. How is the value of pickles determined in South Deerfield?

A. By what you are satisfied to take for them. There is no every day, published market in South Deerfield on pickles.

[fol. 143] Q. 112. And you have to look for your customers and get them and sell them at the best price you can get?

A. That's the object of being in business.

Q. 113. Have you ever known a time in your experience when you could load brine pickles on the cars at South Deerfield at \$10 a thousand—

Mr. Bryant: I object to that.

Mr. Davenport: I don't blame you.

The Court: I will let it stand.

The Witness: No, sir.

Q. 114. Now, the two gentlemen have stated that there was a freeze out West somewhere around September 12th which affected the market for pickles in your vicinity. Did it have any effect on them at all to your knowledge?

A. Not to my knowledge.

Q. 115. Now, how about the sale of pickles during the last year; during 1923 after October 1st?

A. The sale was very limited, and I didn't finish cleaning up until June or July of 1924.

Q. 116. Well, what do you mean by "very limited?"

A. Well, the demand for them.

Q. 117. There was no demand for them?

A. No, sir.

Q. 118. Ordinarily you clean up when?

A. Well, ordinarily we clean up in the spring, but we had stuff stored all winter; last winter.

Q. 119. Well, I understand, but I mean ordinarily before that in other years.

A. Oh, it depends altogether on the crop at that time. Some years we have a small crop and we get through February—that is, working, and that the stuff goes out as fast as we can get it out. And at other times we have to store it.

Q. 120. And this year it was from 1923 until June, 1924, before you could unload the crop that you had?

A. I always had pickles.

Q. 121. Now, you were willing to sell them, I suppose?

A. Yes, sir.

Q. 122. And making efforts to sell them?

A. Yes, sir.

Q. 123. There was no shortage so far as you know?

A. Not at South Deerfield, anyhow.

[fol. 144] Q. 124. Now, at some time were you interviewed by Mr. Molumphy at your place?

A. You mean 1924?

Q. 125. Yes.

A. Yes, sir.

Q. 126. When was it?

A. Well, it was approximately around the 10th or 15th of August, 1924. He and Mr. Klein of New York were there.

Q. 127. As a result of the conversation which you had with Mr. Molumphy did you meet Mr. Molumphy and Mr. Simmons in Springfield?

A. Next Monday night.

Mr. Bryant: What is the object of this? This is 1924.

Mr. Davenport: Mr. Molumphy said he didn't say anything about buying this. To contradict Mr. Molumphy.

He said Mr. Simmons didn't say a word about buying it, and he never said a word about buying it. It is just a contradiction; that's all. If you will admit that Mr. Molumphy asked him if he would sell to them, and that they met in Springfield, and that Mr. Swan met them for the purpose of selling to them, why, I don't care about going on with it.

Mr. Malone: Assuming that that is true, what possible interest can that be to his Honor or the jury; this failure to carry out an agreement?

The Court: It is offered to contradict your witnesses; that's all.

Mr. Bryant: It was brought out, as I recall it, on cross-examination, I am sure.

The Court: Go ahead.

Q. 128. What talk did you have with Mr. Molumphy at your place, or what did he have with you?

A. I met him at the Hotel Warren. Mr. Klein.

Q. 129. I don't care about that. Come down to Mr. Molumphy.

A. I met Mr. Molumphy at the Hotel Warren some time during—from half-past nine to half-past ten; a very hot day—

Q. 130. In the morning?

A. Yes, sir.

Q. 131. Well, go ahead.

A. A very hot day. And we sat on the piazza, and he told me that he was not able to get any interest in the stock of the Silver Lane Pickle Company, and he and Mr. Simmons would like to buy out my property that they had agreed to take the year before. He asked me what was my price. He asked me if I would sell; and I said: "Yes, sir; if Mr. Gould hasn't anything to do with it I will sell you my real estate at the very same figure that I offered to sell it to you last year." He asked me how many tanks of pickles I had, and I said they were not coming in very fast; we had only four or five tanks filled. He said: "When will you meet Mr. Simmons and me?" I said: "Any time whenever you ask me to." "Well", he says: "what about Monday night in Springfield at the Hotel Highland at seven-thirty?" I said: "All right, sir; I will be there." And he said: "Can I drive home without going by the Silver Lane Pickle shop?"—Mr. Gould's place. And I said: "Yes,

sir, you can go the back way through South Mill River." That was the sum and substance of the conversation.

Q. 132. Did you go to the Hotel Highland?

A. Yes, sir.

Q. 133. And did you there meet—

A. Mr. Molumphy and Mr. Simmons, both.

Q. 134. Now, I don't care about their private matters, but I would like to have you tell now what was said relative to your selling—what you told them you would sell for. Leave out what they said.

A. There was nothing said that night about what I would sell out for. They told me the reason was that they had changed their mind.

Q. 135. And didn't want to buy?

A. Yes, sir.

Q. 136. And how long were you with them that time?

A. I sat in their car—well, we smoked one or two cigars, so it must have been a half an hour or more.

Q. 137. Now, at some time did you have a conversation with Mr. Simmons along about the 1st of October, 1923, or about in that vicinity, relative to his purchase of Jewett's pickles?

A. Yes, sir.

Q. 138. What did he tell you?

A. He told me that he had bought half of Jewett's pickles. He had bought all the crop at Northfield and all of the stock that Jewett had at South Deerfield.

[fol. 146] Q. 139. Go ahead.

A. That's the conversation. And he paid three fifty a thousand for them.

Q. 140. Fix the date of that as near as you can, Mr. Swan.

A. I can fix it definitely. It was on—no; I can't, either. It was before I sold my stuff when we were talking about the sale.

Q. 141. What did you say?

A. It was when we were talking about the sale of the pickles.

Q. 142. Some time in—

A. Well, it might have been a week before the agreement was drawn up, I would say.

Q. 142. Is that [showing paper] the bill of sale which you offered?

A. Yes, sir.

Q. 144. Is that [showing paper] the deed?

A. Yes, sir.

Q. 145. When Mr. Simmons told you that he bought the pickles, did he tell you what kind of pickles he bought?

A. He told me that he bought all the pickles at Northfield and half of Jewett's stock at South Deerfield.

Q. 146. Well, what I wanted to know is, whether he stated what quality or kind they were?

A. They were all vat run pickles.

Q. 147. They were all vat run pickles?

A. Yes, sir.

Mr. Bryant: Do you offer those as exhibits?

Mr. Davenport: No; I didn't offer them. There is no occasion for that. It is in evidence that they were tendered.

Cross-examination.

By Mr. Malone:

X Q. 148. Mr. Swan, do you remember the case of Commonwealth against Goldfarr?

A. Yes, sir.

X Q. 149. Tried about two years ago?

A. Yes, sir.

X Q. 150. It was an insurance case, wasn't it?

A. Yes, sir.

Mr. Davenport: I object. He can't open up that.

The Court: I can't see how that is of any materiality. If it is leading up to something—

Mr. Malone: I will state what it is in my question so there won't be any doubt about it.

X Q. 151. You have stated that the Chicago market did not affect nor did it control the price of pickles at South Deerfield, haven't you?

A. It doesn't affect the South Deerfield market.

[fol. 147] X Q. 152. I ask you now whether or not in the case of Commonwealth against Goldfarr you were a witness and testified under oath that the market value of pickles in South Deerfield and locality was controlled by the Chicago market?

A. I don't remember.

X Q. 153. Well, think.

A. I don't remember.

X Q. 154. You were a witness in such an action?

A. Yes, sir.

X Q. 155. And did testify about the controlling market on pickles?

A. I don't remember about—I was a witness—about the price.

X Q. 156. You testified in that action as to the amount of pickles owned by the defendant, or relative to that, and also as to the market value of those pickles, didn't you?

A. I don't remember.

X Q. 157. Well, then, I will ask you again whether or not you remember having testified in that action that the Chicago market was the controlling market relative to the value of pickles in the East?

Mr. Davenport: Just a minute. If he did so testify, it is a matter of record.

Mr. Malone: Well, let's see if he remembers so testifying. Perhaps that refreshes his recollection.

The Court: I didn't get the full question. If I did get it, it wasn't in proper form. I think it assumes something to which he hasn't testified. Reframe that question or frame another, and I will follow you.

X Q. 158. I ask you now, having remembered that you were a witness relative to the pickle question and the markets, whether or not you remember having testified that the controlling market on pickles and their values was Chicago?

A. I don't remember what I testified.

X Q. 159. Well, did you testify on that subject at all in that case?

A. Testified on the case—

X Q. 160. On the subject of the controlling market of pickles.

A. Of brine pickles or dill pickles.

X Q. 161. Yes, as Chicago making the market price for pickles.

A. I wouldn't say that I did.

[fol. 148] X Q. 162. And would you say that you didn't?

A. I don't remember.

X Q. 163. October 1st, 1923, was the last day for a consummation of the contract between Mr. Simmons and yourself?

A. Yes, sir.

X Q. 164. And your attorney put in that contract the provision that time was of the essence of the contract?

A. Yes.

X Q. 165. Now, what time did you start for Springfield on that day?

A. Well, I don't imagine before nine o'clock.

X Q. 166. In the morning?

A. I don't think we left as early as that.

X Q. 167. Do you remember that on two or three other occasions Mr. Simmons had been at your home as early as seven or thereabouts in the morning?

A. No, sir.

X Q. 168. Do you recall having received a letter which was in answer to your communication in which he advised you that it was election day in Connecticut and he would not be there early in the morning?

A. Yes, sir. I have that letter.

X Q. 169. Did you anticipate his arrival in the morning?

A. No, sir.

X Q. 170. When did you think he would get there?

A. I thought he would be there by noon or in the afternoon.

X Q. 171. You started for Springfield about nine o'clock?

A. I would imagine so.

X Q. 172. Were you alone?

A. My wife was with me.

X Q. 173. And there was some lady at your home during your absence?

A. Yes, sir.

X Q. 174. Probably a maid?

A. My wife's sister.

X Q. 175. Now, how long did it take you to get to Springfield?

A. The driving time is about an hour and a quarter.

X Q. 176. And you stayed here about how long?

A. We had dinner here. We started right after dinner.

X Q. 177. For Westfield?

A. Yes, sir.

X Q. 178. And you got to Westfield about what time?

A. Probably about a half hour's run.

X Q. 179. Well assume that you left South Deerfield at [fol. 149] nine; you got in about ten thirty and you stayed here how long?

A. We had lunch here.

X Q. 180. About noon time?

A. Yes, sir.

X Q. 181. And then went to Westfield?

A. Yes, sir.

X Q. 182. Is Westfield in the general direction of Greenfield?

A. No, sir.

X Q. 183. Is it in the opposite direction?

A. It is west from Springfield.

X Q. 184. West. It is at right angles to the direction in which you would go to Greenfield, is it, from Springfield?

A. Yes; it is not the direct route.

X Q. 185. So you left here some time after you had lunch; some time about one o'clock?

A. I would imagine that was about the time.

X Q. 186. And it takes about half an hour to drive from Westfield to Springfield?

A. I should think so. About ten miles.

X Q. 187. So you got here about one thirty or two o'clock?

A. I should imagine one thirty; nearer than anything else.

X Q. 188. Did you communicate with the offices of Davenport & Fairhurst?

A. Yes, sir.

X Q. 189. Where from?

A. Westfield.

X Q. 190. By telephone?

A. Yes, sir.

X Q. 191. What time was that?

A. Before I left Westfield—before two o'clock, I should say.

X Q. 192. What time do you claim to have left Westfield?

A. I didn't stay in Westfield—I didn't stay there fifteen

minutes. I came direct from Westfield to my home in South Deerfield.

X Q. 193. How many miles is that?

A. About 28 miles.

X Q. 194. Did you telephone—you say you telephoned your lawyers before you left Westfield?

A. Yes, sir.

X Q. 195. Why didn't you go to your lawyers' office from Westfield?

A. I wanted to see whether Mr. Gould had been up to my house or not.

X Q. 196. In your conversation with your attorneys, didn't they advise you that Gould and Simmons had been there all day?

A. Yes, sir. They didn't tell me how long they had been there.

[fol. 150] X Q. 197. Why didn't you go to their offices then?

A. I did go. I stopped at home.

X Q. 198. You went through South Deerfield to get to Greenfield?

A. Yes, sir.

X Q. 199. How long did you stay at your home?

A. Well, my wife got out and went in the house and so did I.

X Q. 200. What time does the bank in South Deerfield close?

A. Three o'clock.

X Q. 201. You are a depositor there?

A. Yes, sir.

X Q. 202. Do you know what time the banks close in Greenfield?

A. I suppose, business hours. I have been in banks—any bank after three o'clock—the books close.

X Q. 203. You have done banking in Greenfield?

A. Yes, sir.

X Q. 204. And you know they close at three o'clock?

A. I know they close their books—I suppose they do.

X Q. 205. Now, it appears from one of the exhibits here, Plaintiff's Exhibit B, that on the day when you signed the contract with Mr. Simmons you took a check from him.

A. I did.

X Q. 206. Payable to yourself for \$500, and put it through the bank in the regular course of business?

A. Yes, sir.

X Q. 207. And you also wrote him a letter, Plaintiff's Exhibit G, on the 22d of that month—September 23—in which you say: "You spoke about giving me a check in full for pickle stock. I trust you will do so, as it will be more convenient for me." You wrote that letter, of course, did you not?

A. Yes, sir.

X Q. 208. Asking or suggesting a check for it.

A. He wasn't going to pay \$2,500. I borrowed the money and would much prefer cash to pay my indebtedness.

X Q. 209. When you arrived at Mr. Davenport's office you say it was four fifteen, did you not?

A. Right around four fifteen; yes, sir.

X Q. 210. Did you have any idea that the banks were open at that time?

A. No, no; I had not thought of the banks.

X Q. 211. Did you expect Mr. Simmons to have \$2,500 in gold or United States legal tender to give you in Mr. Fairhurst's office?

A. I expected he would pay me the \$2,500 as per the agreement.

[fol. 151] X Q. 212. Did you expect Mr. Simmons to offer you in your lawyer's office \$2,500 in gold or United States legal tender?

A. Yes, sir.

X Q. 213. What made you think he would?

Mr. Davenport: Just a moment. I pray your Honor's judgment.

The Court: This is cross-examination. I admit it.

X Q. 214. Well, you had written that—

Mr. Davenport: We will have the question. Read the question.

[Previous question read by stenographer, as follows:]

"X Q. 213. What made you think he would?"

A. He was going to pay me \$2,500.

Mr. Davenport: No. Just read the question before that.

[Previous question read by stenographer, as follows:]

"X Q. 212. Did you expect Mr. Simmons to offer you in your lawyer's office \$2,500 in gold or United States legal tender?"

A. It was a part of the contract that I entered into.

X Q. 215. Well, why did you suggest in your letter of a few days before, which is dated the 22d, that you would like a check?

A. If I had got a check the 22d of—

X Q. 216. September?

A. September; I could have had it cashed before. I could have found out whether it was good before I passed over my property.

X Q. 217. I see. But you don't suggest that, Mr. Swan. You say here: "You spoke about giving me a check in full for pickle stock. I trust you will do so, as it will be more convenient for me."

A. Yes, sir.

X Q. 218. Did you expect that he would sit down and send a check from East Hartford?

A. I didn't know whether he would send it or come up and transfer the papers.

X Q. 219. If he had given you a check you would have been satisfied?

A. If it had been good; yes, sir.

X Q. 220. A check for \$500 upon which you opened the agreement was good, wasn't it?

A. Yes, sir.

[fol. 152] X Q. 221. Do you claim now that this certificate of deposit on the South Deerfield bank for \$2,500 was not good?

A. I never knew anything about the certificate of deposit until after this thing had fallen through.

X Q. 222. What kind of a check did you think it was?

A. I had no knowledge of a check. Mr. Gould took the check out of his pocket, and that is the time I asked Mr. Davenport.

X Q. 223. Let's see, Mr. Swan. Did you take any precaution or make any effort to ascertain what it was he offered you—what your lawyers call a piece of paper?

A. Well, I supposed it was a check.

X Q. 224. And then promptly without looking at it or having anything to do with it, you said: "Is that all you got?"

A. No, sir. I asked Mr. Fairhurst if I was obliged to take a check in payment?

X Q. 225. And he said no?

A. He said no.

X Q. 226. So that you claim that you did not have the check in your hands?

A. I don't claim it. I say I did not have the check in my hands at any time.

X Q. 227. Did you think it was—you didn't know what kind of paper it was, in other words?

A. Well, it looked like a check. I imagined it was a check.

X Q. 228. Don't you recall a conversation in which the plaintiff and other men called your attention to the fact that it was a cashier's check on the South Deerfield Bank?

A. There was never one word mentioned about a cashier's check on the South Deerfield Bank in Mr. Davenport's office.

X Q. 229. Was there anything mentioned about a certificate of deposit on the South Deerfield Bank?

A. No, sir.

X Q. 230. Then you supposed it was Mr. Simmons' check?

A. I didn't know what it was; whether a check—

X 231. You recall that Mr. Simmons said to you, "If you don't want that type of check, I will give you my check?"

A. Yes, sir.

X Q. 232. And you declined that?

A. Yes, sir.

X Q. 233. Did you at any time before the arrival of your [fol. 153] self at Mr. Fairhurst's office ever communicate in any way that you wanted anything but a check?

A. I don't know why I should. The contract shows what I wanted.

X Q. 234. Did you?

A. No, sir.

Mr. Davenport: I think that is a proper answer, may it please the court.

X Q. 235. Your answer is "no"?

A. No, sir.

X Q. 236. That is more than I expected.

A. You are entitled to it.

X Q. 237. I notice that the deed is signed by Mrs. Swan and yourself.

A. Yes, sir.

X Q. 238. The property stands in both of your names, I take it?

A. No, sir.

X Q. 239. Perhaps the law requires both of your signatures.

A. I don't know about that, sir.

X Q. 240. Anyway, I think you said she came with you to Mr. Davenport's office. How long were you there before you got into the company of Mr. Simmons and his associates?

A. Not long. Just long enough to sign the deed and then I went through to go into—I don't know what office they call it, but sort of a back office. That is where they keep the law books.

X Q. 241. Some other room other than the consultation room?

A. Yes, sir; right through.

X Q. 242. And you were how long in the consultation room?

A. My wife didn't come in there. She signed the papers in the front office.

X Q. 243. And then she went through and down into the automobile?

A. Yes, sir.

X Q. 244. What makes you say it was four fifteen?

A. Because I left home at the time my daughter got off the electric car at three forty-five.

X Q. 245. Did she tell you that she had been talking with any of the Connecticut people—your daughter?

A. No, sir; I didn't talk with her at that time.

X Q. 246. What time did you leave Mr. Davenport's office?

A. After dark.

[fol. 154] X Q. 247. It was after seven o'clock, wasn't it?

A. Yes; it was around half past six or seven o'clock. I don't know how long.

X Q. 248. And from four fifteen, then, until after seven o'clock you were there talking about this affair?

A. Well, I wasn't talking very much. They had a consultation in the adjoining room for a good long period. I don't know how long.

X Q. 249. You base your claim that you arrived there at four fifteen because when you got to South Deerfield you met a trolley car which should arrive about three forty-five on which your daughter was a passenger?

A. Yes, sir.

X Q. 250. Well, did you go at that time?

A. I was coming out of the yard.

X Q. 251. And the trolley car went by where you saw it?

A. The trolley car stopped over opposite where I live.

X Q. 252. How much time intervened between that time and the time you arrived at Mr. Davenport's office?

A. Not many minutes; 20 or 25 minutes. I drove right along. It never takes me more than half an hour unless there is some obstruction in the road or something.

X Q. 253. After you left Mr. Davenport's office, which was after seven o'clock, did you go back home?

A. Yes, sir; went back to supper.

X Q. 254. Then you went over to Northampton?

Mr. Davenport: Well, just a moment. How is that material, if your Honor please, where he went after he left the office? It had nothing to do with him.

The Court: Has there been any direct examination about that?

Mr. Davenport: No, there has been no direct examination about that. It is very new, may it please the court.

Mr. Malone: I think, your Honor, I should be entitled to show that Mr. Swan—

Mr. Davenport: Just a minute. I don't think it is proper for you to tell what you are going to show.

The Court: Well, you don't need to. I know what you are going to say, but you are cross-examining this witness and you are confined to direct testimony.

[Vol. 155] Mr. Malone: Well, I don't think, your Honor, I should be confined to the immediate moments around which this transaction took place. If I can show that Mr. Swan went out of South Deerfield and stayed out there until twelve that night, I think I am entitled to show that.

I might say that the essence of the contract is time, and the time didn't expire until twelve o'clock midnight.

Mr. Davenport: I want to take an exception to my brother's statement, if it please the court. He knows full well he ought not to make it.

The Court: You have got to confine yourself to direct examination in cross-examination.

Mr. Davenport: Just a moment. I am going to ask that this case be taken from the jury. That certainly is extremely prejudicial to the jury.

The Court: I think it was prejudicial to the jury, but I think I can make a statement to the jury that they can disregard it.

Mr. Davenport: Your Honor will save me the question as to his statement and your refusal to take it away from the jury.

Mr. Malone: I would like to ask this question, if it would be acceptable to the court, and have it ruled on so that I may take an exception if it is excluded.

The Court: Ask the question.

X Q. 255. Whether or not you remained in South Deerfield, Massachusetts, from the time that you left Mr. Davenport's office up to twelve o'clock midnight that night?

Mr. Davenport: Just a minute; it is immaterial.

The Court: I ought to exclude it on the ground that it is beyond the scope of the direct examination.

Mr. Malone: Then may I save an exception?

The Court: Gentlemen of the jury, you will please disregard what happened after Mr. Swan left the office of Davenport & Fairhurst. You will disregard counsel's statement.

X Q. 256. You have testified about having signed a paper here, and your wife also having signed it.

A. Deed.

X Q. 257. That deed?

A. Yes, sir.

[Vol. 156] X Q. 258. You signed that, as you have testified, at the time your wife signed it in Mr. Davenport's office.

Mr. Davenport: He didn't so testify.

Mr. Malone: Well, I understood it that way. Maybe I am wrong again.

X Q. 259. Where did you sign the deed?

A. I signed it before that time.

X Q. 260. Oh, you signed it before?

A. Yes, sir.

X Q. 261. Your wife signed it after that—

A. Yes, sir.

X Q. 262. After you and she arrived at Mr. Davenport's office?

A. Yes, sir.

X Q. 263. And I think you said that having signed it she went down to the automobile.

A. Yes, sir.

X Q. 264. But you stayed up in the office?

A. Yes, sir.

X Q. 265. Do you know whether Mrs. Swan went home?

A. She didn't go home until I did.

X Q. 266. Now, there was a bill of sale also. When did you sign that?

A. I didn't sign it that night. It wasn't signed that night.

X Q. 267. When?

A. I don't know. A few days before. I signed the deed and the bill of sale—it seems as if it was some time before. I don't remember signing that night. All that I remember is that it lacked my wife's signature.

X Q. 268. You and Mr. Simmons figured out the amount to be written in the note which he was to give you for 14,000 and some odd dollars during the discussion there?

A. Mr. Simmons had the figures, and I had the figures before that.

X Q. 269. Well, you finally authorized Mr. Fairhurst to write the amount in?

A. Yes, sir; whatever he wrote in was right.

X Q. 270. And agreed upon between you?

A. Yes, sir.

X Q. 271. That was some time after you arrived at Mr. Fairhurst's office and Mr. Davenport's office?

A. Yes, sir.

X Q. 272. You don't figure your real estate very valuable up there, Mr. Swan?

A. Yes, sir, I figure it is valuable.

X Q. 273. That is to say, the three-tenement house, the [fol. 157] pickle factory and the pickle sheds. Well, apparently you haven't spent any money on them recently.

A. Why, yes; I have spent some.

X Q. 274. It was painted inside and out in the summer of 1923?

A. Painted outside.

X Q. 275. But from September up to November of last year—'23 no '24—there were no expenditures on it?

A. Between when?

X Q. 276. Oh, between September of 1923 up to November, 1923.

A. September to November—no.

X Q. 277. I am interested a little bit in that Ford truck. That was a 1923 truck, wasn't it?

A. Yes, sir.

X Q. 278. It had only been run a short distance?

A. Well, it had been run a good many miles.

X Q. 279. That's what I mean. I don't know. Had it?

A. Yes, sir.

X Q. 280. It was a 1923 model of a Ford truck?

A. Yes, sir.

X Q. 281. Do you know what you paid for it?

A. I paid \$680.

X Q. 282. You give an estimate on October 1st of \$350?

A. That wasn't out of the way.

X Q. 283. It wasn't excessive, either, was it?

A. No; I think it was about right.

X Q. 284. And your Reo truck? Was that a 1923 model?

A. No, sir.

X Q. 285. It was a 1922 model?

A. Yes, sir.

X Q. 286. And you paid for it how much?

Mr. Davenport: Just a moment. I don't see how that is material; how much he paid for it. I don't care, though. Go ahead. I waive the objection.

The Witness. All right for me to answer?

X Q. 287. Yes, sir.

A. I paid around \$1,000.

X Q. 288. Did you get it in the middle or first or latter part of '22?

A. I probably got it in June of '22, or something like that.

X Q. 289. In the early summer of '22; and drove it into '23?

A. Yes.

X Q. 290. And up to October 1st, 1923?

A. Driving it yet.

X Q. 291. Driving it yet?

A. Yes, sir.

[fol. 158] X Q. 292. Do you claim that the fair market value of that truck was \$700?

A. More than I could get for it in trade.

X Q. 293. Yes; but do you claim that for the use in your business, the fair market value of that truck was only \$700—

Mr. Davenport: Just a moment. I pray your Honor's judgment on that.

The Court: What we want is the fair market value.

The Witness: I think the fair market value was right around \$700.

X Q. 294. You had a conversation with Mr. Simmons, of course—more than one—before you finally entered into this agreement of September 13th?

A. Yes, sir.

X Q. 295. During this conversation Mr. Simmons and yourself went over the premises together, didn't you?

A. No.

X Q. 296. Well, the conversation took place, didn't it?

A. At my place.

X Q. 297. You and he were not strangers. You had done business with him before?

A. Done business with the Silver Lane Pickle Company; yes.

X Q. 298. And with Mr. Simmons personally?

A. No, sir.

X Q. 299. Well, you had done business with Mr. Simmons for the Silver Lane Pickle Company?

A. Yes, sir.

X Q. 300. He is their representative?

A. Yes, sir.

X Q. 301. You have had many transactions, haven't you?

A. Not many.

X Q. 302. Your counsel in addressing the jury at the outset said that you had had no business relations with Gould.

Mr. Davenport: I didn't say so. I said, no business relations in this matter. I didn't say "no business relations."

X Q. 303. Well, you were acquainted with Mr. Simmons some time before?

A. Yes, sir.

X Q. 304. And during the discussion between you and he, as to whether you would sell and he buy the plant, you had met him on at least two occasions?

A. Two or three times; yes.

X Q. 305. Now, in fixing the values and the figures at which you would sell your pickle business and the pickles, [fol. 159] you made various statements to Mr. Simmons, didn't you? For instance, your vinegar was located in the cellar of the house, wasn't it?

A. Yes, sir.

X Q. 306. In the cellar of the three-tenement house?

A. Yes, sir.

X Q. 307. And you told him there were 92 barrels of vinegar in the cellar, didn't you?

A. Absolutely, no, sir; I did not.

X Q. 308. There were 92 barrels of vinegar there, weren't there?

A. No, sir.

X Q. 309. How many barrels of vinegar were there?

A. Not over eight or nine.

X Q. 310. Well, do you know of any reason why Mr. Molumphy and Mr. Simmons should get the idea that they were buying 92 barrels of vinegar from you?

A. Absolutely not.

X Q. 311. That must have been a pure flight of fancy, then, must it not?

A. There were empty barrels there.

X Q. 312. Did you state to Mr. Simmons in your conversation that there were 92 barrels of vinegar on the premises?

A. Positively, no, sir.

X Q. 313. Well, there might have been 92 barrels in the house, eight or nine of which had vinegar in?

A. I think there were eight or nine with vinegar.

X Q. 314. But there were 92 barrels there?

A. Not 92 barrels all told there.

X Q. 315. Well, how many were there there?

A. Less than that.

X Q. 316. But you don't know how many less?

A. I know there were less than 92, because 100 constitutes a car, and when we pile up our vinegar it takes three lengths of the cellar on the west side. Now, there wasn't any such amount of empties or full barrels or anything else in there, because I hadn't bought any vinegar to the best of my recollection—it might have been January or February—and we didn't get through until April.

X Q. 317. You always treated the pickles after September 13th, 1923, as the property of Mr. Simmons? You [fol. 160] figured they were his pickles?

A. I supposed he was going to have them; yes, sir.

X Q. 318. In fact, after you made the tests you have described to Mr. Davenport and found the salt solution was too weak, you remember advising him to send up salt from East Hartford?

A. I didn't advise him to. I told him I would get the salt, and he said he had some in Hartford and was coming up through to Jewett's and would put it on, which he did.

X Q. 319. He was sending salt up to Jewett's.

A. No; he was coming up to Jewett's on some errand—I don't know. He had an errand at South Deerfield or Northfield and was coming up to South Deerfield and said he would send up a ton of salt.

X Q. 320. Well, the salt was sent up, anyway?

A. Yes, sir.

X Q. 321. And you advised his man that he had better put it on; that you did not feel under responsibility?

A. No, sir.

X Q. 322. Who did put the salt in the tanks?

A. I did, or my men.

X Q. 323. You are sure of that?

A. Positively. There was one bag of that salt that was never used.

X Q. 324. Well, as a matter of fact—although it is not of very much importance maybe—you never paid for that salt?

A. Well, Mr. Gould never paid me the balance that he owed me in 1922, either.

X Q. 325. Well, I know, but your attorney says that he was not a part of this transaction.

Mr. Davenport: What are you trying to do?

Mr. Malone: If you have no objection I would like to introduce a number of checks here, but I take it that you don't care about it.

Mr. Davenport: I will take care of myself. You don't need to.

Mr. Malone: It is perfectly obvious. Thank you very much.

Redirect examination.

By Mr. Davenport:

Q. 326. Mr. Swan, just one question. Why didn't you take that check?

A. On October 1st?

Q. 327. Yes.

A. I was afraid it might be protested or stopped payment and my property tied up.

Mr. Davenport: That's all.

[fol. 161] Elmer E. Hubbard (sworn).

By Mr. Davenport:

Q. 1. What is your name?

A. Elmer E. Hubbard.

Q. 2. Where do you live, Mr. Hubbard?

A. South Deerfield, Massachusetts.

Q. 3. And what is your business?

A. Well, during part of the year I am assessor of the town of Deerfield, and at other times I have property that I take care of, and sometimes I do jobs when I have time.

Q. 4. How long have you been one of the assessors?

A. This is the seventh year.

Q. 5. And you are acquainted with the property of Edward P. Swan in Deerfield?

A. I am.

Q. 6. What is the fair market value of the pickle factory and the lot and the tenement house standing there, all together in a lump?

A. The buildings or only the fixtures?

Q. 7. The buildings and the fixtures as they are there.

A. The buildings and the carriers and the tanks?

Q. 8. October 1st, 1923, what was the fair market value of the buildings and the tanks and the carriers and the other stuff on the lot?

A. I should say, \$8,000.

Mr. Davenport: Take the witness.

Cross examination.

By Mr. Bryant:

X Q. 9. I didn't understand your answer to that question.

A. I said, \$8,000.

Mr. Bryant: Will the stenographer read his answer?

[Previous answer of witness read by stenographer as follows:]

"A. I should say, \$8,000."

X Q. 10. On what do you base your knowledge?

A. What I would give for property located as it is.

X Q. 11. Do you know about the sale of any pickle property in Greenfield?

A. I don't know of any, no, sir; only this case, what I heard here these last two days.

X Q. 12. Only what you have heard in this case?

A. Yes, sir.

[fol. 162] X Q. 13. You have been assessor for eight years?

A. No; seven years.

X Q. 14. Did you ever know of any pickle property sold up there?

A. No, I can't say that I did.

X Q. 15. Did you ever know of the sale of any pickle machinery up there?

A. No, sir.

Mr. Bryant: That's all, Mr. Hubbard.

SAMUEL W. CHILDS (SWORN).

By Mr. Davenport:

Q. 1. What is your name?

A. Samuel W. Childs.

Q. 2. Where do you live?

A. Deerfield, Massachusetts.

Q. 3. Farmer?

A. Yes, sir.

Q. 4. And you have been or are a selectman of the town?

A. I have been. Not now.

Q. 5. Do you hold any town office?

A. Not any.

Q. 6. You have bought and sold real estate in the town of Deerfield?

A. I have.

Q. 7. About how many acres of land in Deerfield do you own now, Mr. Childs?

A. I don't know as I can answer that question. I have got about 240 acres, but the woodland, I don't know how much I have got.

Q. 8. Scattered in various parts of Deerfield?

A. It is; yes, sir.

Q. 9. Do you know the Swan pickle property down there?

A. I do.

Q. 10. What is the fair market value of that pickle property without the equipment inside?

A. That is, for the tanks and the sheds?

Q. 11. Yes.

A. That is, the pickle house and the tenement house.

Q. 12. Pickle house, tenement house and the land.

A. \$6,500. That is without the tanks and the equipment.

Q. 13. Now, Mr. Childs, you raise pickles?

A. Yes, I raise pickles.

Q. 14. And about how many acres?

A. Oh, 2½ or 3 acres, that's all.

[fol. 163] Q. 15. Now will you explain to the jury how the pickles are handled in the field?

A. Why, they are picked there and counted and put into bags and delivered to the salting house.

Q. 16. Well, what is picked? What is supposed to be picked?

A. Well, I don't know as I know just what you mean.

Q. 17. Well, what is a farm run pickle?

A. Well, usually they demand over 3½ inches, free from nubs and crooks and spotted cucumbers.

Q. 18. How about there being nubs and crooks and spotted ones in them?

A. It is impossible to keep them all out. We try to keep out all we can.

Q. 19. What would be the approximate average would you say of the number of crooks and spots?

A. Oh, I don't know. It is a small per cent. I don't know as I could tell.

Q. 20. Well, five, eight, ten or what?

A. Five or ten per cent, I should think.

Mr. Davenport: That's all.

Cross examination.

By Mr. Bryant:

X Q. 21. You don't intend to let any nubs and crooks get in when you pick them?

A. We try to keep them out. You can't keep them all out.

X Q. 22. You can't keep them all out. Some will creep in?

A. Yes, sir.

X Q. 23. So you think that in picking these pickles that you get in nubs and crooks in about five or ten per cent?

A. I should think pretty near that. Not all nubs, but crooks and spots.

X Q. 24. Nubs and crooks and spots?

A. Yes, I should think so.

X Q. 25. You sell them by count?

A. Yes, we sell them by the thousand.

X Q. 26. And if they do get in you get the same price for the nubs and spots?

A. Yes, sir, if they take them.

X Q. 27. But you try to keep them all out?

A. Yes, sir, we do.

X Q. 28. What proportion of your growth are nubs and crooks?

A. I don't think I could answer that question.

[fol. 164] X Q. 29. Well, you can answer very readily what proportion you pick. Now, what proportion of the growth is that?

A. I don't know as I could answer that. I never pick cucumbers myself. I don't know how many they leave on.

X Q. 30. How do you get at this five or ten per cent of nubs and crooks that are picked?

A. I mean, that are in there.

X Q. 31. You pick five or ten per cent?

A. Well, I don't know that there are ten per cent that go to the salting shops.

X Q. 32. Well, when you say that you are picking them and you put in five or ten per cent of nubs and crooks, although you try to keep them out, what percentage of your crop is crooks and nubs?

A. Oh, I don't know. Perhaps 15 or 20 per cent.

X Q. 33. Fifteen or 20 per cent?

A. Yes.

X Q. 34. And five to ten per cent get in your pickles. How long have you grown cucumbers?

A. Oh, perhaps 10 or 12 years. I don't grow every year. I have been growing for about that length of time, I think.

X Q. 35. When you estimate the value of that property as \$6,500, upon what basis do you estimate it? How do you get at the figure 6,500 instead of six or seven thousand.

A. I thought that is about what that would sell for bunched.

X Q. 36. Well, for as what?

A. The tenement house as a tenement house.

X Q. 37. The tenement house as a tenement house; yes. And the other?

A. The other was originally——

X Q. 38. Never mind what it was originally. How much value did you put on the tenement house?

A. I put that at \$5,000.

X Q. 39. Then the rest of it you put at how much?

A. \$1,500.

X Q. 40. Do you estimate that as a pickle factory or the value of junk to scrap?

A. I estimate it as a sale to put back into a tobacco shed.

X Q. 41. Well, what did you estimate the value of it to sell as a pickle factory?

A. Gosh! I don't know what it is worth as a pickle factory.

X Q. 42. You don't know what it would be worth selling as a pickle factory?

A. No, sir.

[fol. 165] X Q. 43. Did you ever know of a pickle factory up there being sold?

A. No; I don't think so.

Redirect Examination.

By Mr. Davenport:

Q. 44. What you meant to say was that——

Mr. Bryant: No; don't put it that way; just ask him. It makes a good deal harder reading.

Mr. Davenport: That's all, then.

CHARLES FAIRHURST (SWORN).

By Mr. Davenport):

Q. 1. What is your name?

A. Charles Fairhurst.

Q. 2. Live in Greenfield?

A. Yes, sir.

Q. 3. A lawyer?

A. Yes, sir.

Q. 3. Practised for how long?

A. Going on eight years.

Q. 5. On October 1st did you see Mr. Simmons and Mr. Molumphy and Mr. Gould——

A. I did.

Q. 6. And Mr. Lawler at your office?

A. I did.

Q. 7. At some time did Mr. Swan come?

A. He did.

Q. 8. What took place after Mr. Swan arrived?

A. Well, he came in, I should estimate, about quarter past four or half-past four. It was in that vicinity. The girls in the office were there, and they leave approximately at five o'clock.

Q. 9. What do you mean by "the girls in the office"?

A. Well, the stenographers.

Q. 10. Go ahead.

A. And they were there when they came in originally; and Mr. Molumphy and the people from Connecticut were seated in one of the ante rooms, and he and his wife—Mr. Swan and his wife—came in, and I had the papers prepared. My recollection is that Mr. Swan had previously signed the papers, but they had been held simply to wait the coming of his wife. She came up. She signed the papers, the deed, and went out. He came in the regular door; the regular entrance. The other people were in, I think, the second reception room, and I had her sign the papers out where one of the stenographers were. And she went downstairs. Then we all went into the law library, which is the largest room there, where we could accommodate the crowd. And they started a general discussion of [fol. 166] things. I know that the matter of the amount to be filled in on the note arose, and from the conversation it appeared that they were together on the amount—at least, I was given the amount, and I wrote it in. The note had been filled out with the exception of the amount which had to be inserted, and I filled that in in longhand. Then there was some talk about the matter of Mr. Swan's competing or going into business, or something of that sort. And we talked that over for a little while. He was selling the good will of the business and he couldn't compete anyway. But they felt that there should be something to limit the time, and they finally agreed on fifteen years, I think. And I wrote that in the bill of sale, that he was not to compete for a period of fifteen years. That took quite a little time. Then there was some mention made—and to save my soul I can't remember who it was that brought the matter up—

but the matter, the conversation, then turned upon paying cash rather than paying the demand note for 14,000 and some odd dollars. And I recollect Mr. Gould and Mr. Swan having some conversation there to the effect that Mr. Swan had written Mr. Gould asking if he could see his way clear to pay the amount of the check, the 14,000, the amount of that note, rather than give a note for it. That brought from Mr. Gould something that he had replied to where he said that he would pay cash if he would make it an object for him to do it. And Swan said that he was getting a demand paper; he was there to perform his contract, and they were there to perform theirs, and he was asking no favors of Mr. Gould at all, and he didn't expect to receive any favors from Mr. Gould. There was quite a little bit of conversation along that general line. He did tell them definitely, Swan did, that when he got the demand note that he would demand it. He said: "You write in your letter to me that you will do otherwise provided I make it an object for you." He says: "I have been in this business for some little time, and I know what a demand note is, and if you think you can come here and tell me that I have got to make it an object for you when you have got demand paper, you have got the wrong fellow." And he says: "If you make [fol. 167] it a demand note I am going to demand my money right away." They talked it over and they said they were not going through with the deal; they were not going to have any hard feelings, and they didn't know as they would go through with the deal. They talked then with Mr. Lawler who was in the consultation there, and they asked him what they could do about the demand paper, and there was some topic of attachments and things of that sort.

Q. 11. What did Mr. Lawler tell him?

A. Mr. Lawler told him that he had a perfect right, receiving the demand paper, to demand it, and that if he did demand it they would have to raise the money. They said that they felt they could take the chance. They would have some time. Suit would not come in court for some time, anyway, and that would not make any difference, until Mr. Lawler told them that in this suit that he might bring against them on this demand note he might be able to tie up these pickles by attachment. They said that put a different complexion on the matter, and they didn't know as they would go through with the deal. They went out

into the other room, all of them, leaving just Mr. Swan and I alone there, and were gone quite a little while. Mr. Lawler went with them. And sometime later they came back and they came through the door, and I think it was Mr. Gould, but I would not be positive of that—I think it was Mr. Gould who said: "Well, we have decided to go through with the deal." And Mr. Swan said: "Well, all right. All I want is my money. Let's waste no more time about it." And so Mr. Gould who was sitting to my left picked from his pocket what purported to be a check, and what I took to be a check. Mr. Swan saw him and he said: "I want money. What I want is money." Mr. Gould says: "I have got your money right here. I have got your paper." And Mr. Swan turned to me and said to me: "Mr. Fairhurst, am I obliged to take a check?" And Mr. Lawler answered first and he said no, he didn't have to—or, at least—yes; he did have to. And I remember that he said he was paying me and not him; and wanted to know if he was obliged to take a check. And I said no, I didn't think he was legally bound to take a check. The contract called [fol. 168] for the equivalent of legal tender. "Well," Swan said, "have you fellows got the money?" "Well, we have got this. It is just as good as money." "Well," he says, "I said 'money.' Have you got the money?" And they said no, they hadn't. Well, he started to get up then, and I told him that I felt that he had better make a formal tender there before he left the office, and I gave him the papers which had been drawn which he was supposed to pass, and he formally tendered those papers to Mr. Simmons, and Mr. Simmons in turn tendered papers including this check to Mr. Swan. Mr. Swan refused to take them, and within a very short time left the office. Well, anticipating then that there would probably be trouble I asked Mr. Gould if he would let me see the check that he had, and I at that time made this memorandum. Then I took the name of the bank on which it was drawn, the number and the amount and to whose order it was payable; namely, to F. C. Gould. I observed that it was made by W. F. Gorey, cashier, but the check was not endorsed. That is the first time that I had observed that, and I simply passed it back to him and made this memorandum.

Q. 12. What papers were tendered by Mr. Swan?

A. He tendered the deed and the bill of sale.

Q. 13. And when he left the office where were those papers left?

A. They were left with us.

Q. 14. And in the presence of Mr. Simmons?

A. Oh, yes.

Q. 15. He was there and knew they were left there?

A. Oh, yes.

Mr. Davenport: Take the witness, Mr. Bryant.

Cross examination.

By Mr. Bryant:

X Q. 16. Mr. Fairhurst, do you want the jury to understand that you did not know that that was a cashier's check until after it had been refused and until they had gone out of the office and you asked the defendant to make a copy of it?

A. That was the first time that I had actually seen the check.

X Q. 17. Answer my question.

A. But when you ask me what I personally thought —

X Q. 18. Do you want this jury to understand that you [fol. 169] didn't know that that was a cashier's check?

A. I did not know definitely, but I supposed —

X Q. 19. Do you want this jury to understand that you didn't know that that was a certificate of deposit or a cashier's check?

A. I thought it was a certified check from the way he talked.

X Q. 20. Then you thought it was a certified check?

A. I thought —

X Q. 21. Did you make any remarks about it looking good to you?

A. I don't recall that.

X Q. 22. Will you say that you didn't say that?

A. No, no; not at all. I would have taken the check if someone wanted to give it to me.

X Q. 23. How long have you been practicing?

A. Eight years in September.

X Q. 24. Do you as a lawyer consider that Mrs. Swan's name was necessary on that deed to convey a good title under Massachusetts law?

A. It was to release her dower rights.

X Q. 25. And she got around to your office at what time?

A. She came with Mr. Swan between quarter past four and half past four.

X Q. 26. Now, these people were in your office in the forenoon, were they not?

A. My recollection about noon time is when some came in.

X Q. 27. Weren't they there before you went to your lunch?

A. I think so.

X Q. 28. They were there when you got back from your lunch?

A. I go about one o'clock.

X Q. 29. You go to lunch about one o'clock?

A. Yes.

X Q. 30. And you communicated to them the information that you had received—you had received information over the telephone that Mr. Swan would be there about three o'clock?

A. About three.

X Q. 31. You had communicated that information to them?

A. Yes.

X Q. 32. Didn't Mr. Frank Gould or one of those gentlemen say: "We are a long way from home," or words to this effect: "We are a long way from home. Can't we [fol. 170] give you the papers and close this up now and let us get away?" And didn't you say: "No, you can't do anything until Mr. Swan comes here?"

A. I don't recollect anything of that sort.

X Q. 33. You knew that Mrs. Swan hadn't signed the deed?

A. So far as Mrs. Swan was concerned, I knew that, certainly.

X Q. 34. You knew that Mrs. Swan had got to sign the deed?

A. Yes.

X Q. 35. Didn't you say that you couldn't do anything until Mr. Swan got there?

A. I don't recollect. My feeling is that I told them that I expected Swan, and then when I found that he was going to be away I told them that, and everybody was content because none of us thought there was going to be any trouble.

X Q. 36. I call your attention to a particular question. Didn't one of those gentlemen ask you if they couldn't leave their papers there and take their deeds and get away because they were a long way from home, and you replied to them no, that you couldn't do anything until Mr. Swan came?

A. I don't recollect it at all.

X Q. 37. Very well. We will let it go that way. You knew that you couldn't didn't you?

A. They could leave their papers. I would have taken their papers.

X Q. 38. But you knew that you couldn't give them their papers?

A. Oh, yes.

X Q. 39. It would have been natural for you to say so wouldn't it?

Mr. Davenport. Just a minute. That is argument.

X Q. 40. You knew that you couldn't give them their deed until Mr. Swan had come there, didn't you?

A. Absolutely.

X Q. 41. And you do not remember whether or not you told them that you couldn't do anything until Mr. Swan came?

A. I don't recollect that.

X Q. 42. Just one other question. Let's assume that Mr. Swan had not got there and they had given you this piece of paper that you afterwards - that you discovered to be a certificate of deposit on that bank, would you have taken it?

A. I would have had to take anything that they left there. (Vol. 1711.) X Q. 43. And if you had Mr. Swan's deed would you have given his deed in exchange for it?

A. That I don't know. I might have taken a chance.

X Q. 44. Well, will you say whether you would or would not?

Mr. Davenport: May it please the court, I think we have gone about far enough.

Mr. Bryant: I think that's all.

Mr. Davenport: Defendant rests.

EVIDENCE FOR PLAINTIFF IN REBUTTAL

THOMAS J. MCMURPHY (recalled).

Redirect examination.

By Mr. Bryant:

Q. 420. It has been testified that you were in Mr. Fairhurst's office.

A. Yes, sir.

Q. 421. While you were in, did you hear any one of the Hartford party request a delivery of the deed and a closing of the transaction?

A. Yes, I did.

Q. 422. Do you remember who made that request?

A. Mr. Frank Gould.

Q. 423. And to whom did he make that request?

A. Mr. Fairhurst.

Q. 424. Approximately what time of day was that?

A. It was three o'clock.

Q. 425. And what was Mr. Fairhurst's reply?

Mr. Davenport: Now, just a moment. I object, may it please the court.

The Court: Didn't Mr. Fairhurst say that he didn't remember? Did he deny that there was any such conversation?

Mr. Bryant: He refused to say that there was such a conversation.

The Court: He said he could not recall it.

Mr. Bryant: He said he couldn't recall it.

The Court: Well, go ahead. Let's hurry up.

Q. 426. What did Mr. Fairhurst say?

A. Mr. Fairhurst says: "We shall have to wait until Mr. Swan comes."

[fol. 172] Mr. Bryant: You may inquire.

Recross examination.

By Mr. Davenport.

X Q. 427. Had you read over this contract?

A. Yes.

X Q. 428. Well, you knew he didn't have to wait?

Mr. Bryant: I object to that, if your Honor please.

The Court: I exclude it.

Mr. Davenport: That's all.

Mr. Bryant: That's all.

FRANK C. GOULD (recalled).

Redirect examination.

By Mr. Bryant.

Q. 158. Do you remember asking Mr. Fairhurst anything about closing the transaction while you were waiting there?

A. Yes, sir.

Q. 159. Approximately, what time of day was it?

A. It wasn't far from three o'clock, because it was after Mr. Molunphy came.

Q. 160. And what was the request?

A. I asked if he couldn't go ahead and finish this up and leave our papers and everything with him. And he answered that he could not until Mr. Swan came.

Recross examination.

By Mr. Davenport.

X Q. 161. Did you have any money there?

A. Did I have any money there?

X Q. 162. Did you have any cash there?

A. I had the cashier's check which I later presented.

X Q. 163. Can't you answer me whether you had the cash?

A. I had the scrap of paper, if you wish to call it that. I didn't have \$2,500 in cash in my pocket.

Mr. Davenport: That's all.

RAY C. SIMMONS (recalled).

Redirect examination.

By Mr. Bryant:

Q. 377. Mr. Simmons, do you remember any conversation between Mr. Gould and Mr. Fairhurst relative to closing the transaction and getting away?

A. Yes, sir.

[Ed. 173] Q. 378. When was it, approximately?

A. Well, just before three o'clock.

Q. 379. What did Mr. Gould ask?

A. Asked if we could close it up and get back, because we were a long ways from home.

Q. 380. And what was Mr. Fairhurst's answer?

A. He said we couldn't.

Q. 381. What reason did he give?

A. He said things entered in so that he had to have Mr. Swan there.

Mr. Bryant: You may inquire.

Recross examination.

By Mr. Davenport:

X Q. 382. Your wife, Mr. Simmons, hadn't signed the mortgage at the time you were in the office? Right?

A. No, she hadn't.

X Q. 383. And she hasn't up to date?

A. No, sir.

Mr. Davenport: That's all.

Mr. Bryant: That's all.

FRANK J. LAWLER (recalled).

Redirect examination.

By Mr. Bryant:

Q. 37. Can you say what time Mr. Swan—oh, you have already testified what time Mr. Swan reached the office that night.

Mr. Davenport: I object, may it please the court.

Mr. Bryant: Object to what.

Mr. Davenport: He has testified once.

Mr. Bryant: Object to my question?

Mr. Davenport: Yes.

Mr. Bryant: I haven't asked him a question.

Mr. Davenport: Well, I am very glad that you put your construction on it!

Mr. Bryant: I know that is the way you ask questions, but I don't ask questions like that.

Mr. Davenport: Well, you have got him upon the witness stand for some purpose!

Mr. Bryant: I am going to ask him a question if you don't object before I have a chance to!

[fol. 174] Q. 38. Do you recall a conversation on that afternoon, or an excerpt of a conversation, between Mr. Gould and Mr. Fairhurst relating to closing the transaction then?

A. Yes, in a general way. I don't know that I could quote the exact words that were used.

Q. 39. I don't ask you to quote the exact words, but what was the purport of that?

A. The substance was that they wanted to get back home. They would like to get away, and wanted to know if they could get it fixed up. And they were told it couldn't be fixed up until after Mr. Swan arrived.

Q. 40. Were you present when this mortgage was executed from Mr. Simmons to Mr. Swan?

A. I was there all through the whole transaction.

Q. 41. Do you know who prepared these papers?

A. They were prepared at the office of Davenport & Fairhurst.

Q. 42. Was any comment made on the fact that Mrs. Simmons hadn't executed the mortgage given by her husband to Mr. Swan?

Mr. Davenport: I object.

The Court: Excluded as immaterial.

Q. 43. In your opinion as a lawyer was it necessary for her to do so?

Mr. Davenport: I object.

The Court: I am surprised at your judgment; but if you object I will rule it out.

Mr. Bryant: That's all. You may inquire.

Mr. Davenport: I haven't any questions.

Mr. Bryant: That's all.

The Court: How can it be contended that a suitable mortgage was presented? A mortgage without the wife's signature was not an acceptable mortgage. As this thing has turned out I can't persuade myself that there is anything here to go to the jury on the question of whether a tender was prevented or obstructed by the defendant. I have been considering what I would say to the jury, and I don't see how possibly I could say anything except to say that there was no evidence to show that the tender was ob- [fol. 175] structed or prevented by the delays of the defendant. Inasmuch as he was entitled to have a tender in money, and if he objected to the checks as a medium of payment at the time and didn't waive or obstruct or prevent a suitable tender, I don't see how the plaintiff can recover in this action.

Mr. Bryant: You will note an exception to the ruling?

The Court: Yes. And I will direct a verdict for the defendant. Have you got a blank?

Mr. Bryant: You will note an exception to the court directing a verdict for the defendant.

The Court: Yes.

[Adjourned.]

The defendant [plaintiff] being aggrieved by the rulings and conclusions of the court that as a part of the tender of performance on the part of the plaintiff a suitable mort-

gage was not presented, in that under the circumstances the signature of the plaintiff's wife was not attached to the real estate mortgage, and that there was no evidence to go to the jury on the question of whether a tender was prevented or obstructed by the defendant, and that under the circumstances, conditions and relations existing between the parties, the defendant was entitled to a tender of twenty five hundred (\$2,500) dollars in money from the plaintiff, to which the plaintiff excepted, now prays that his bill of exceptions be allowed.

Plaintiff, by Percy S. Bryant, 847 Main Street, Hartford, Conn.; William J. Malone, Bristol, Conn.,
His Attorneys.

ORDER SETTLING BILL OF EXCEPTIONS

Allowed April 23, 1925.

Elisha H. Brewster, District Judge.

[fol 176] IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF ERROR—Filed April 23, 1925

To the Honorable Judge of the District Court of the United States:

The plaintiff, Ray C. Simmons, of East Hartford, Connecticut, claims that in the records and proceedings, and also in the rendition of judgment upon a directed verdict in the above entitled action for breach of contract, tried in the District Court of the United States for said District at the December Term, A. D. 1924, in which a verdict was directed by the court against this plaintiff on the eighteenth day of December, 1924, manifest error hath intervened, to the great damage of the defendant.

Wherefore the said Ray C. Simmons prays for an allowance of a writ of error to the Circuit Court of Appeals for the First Circuit for the correction of the errors complained of and herewith assigned, and that an order be

made fixing the amount of securities to be given by the plaintiff as plaintiff in error, conditioned as the law directs, and that upon the giving of such bond as may be required all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

And your petitioner herewith files his assignment of errors.

Plaintiff in Error, by Percy S. Bryant, William J. Malone, Attorneys.

April 23, 1925. Petition allowed. Elisha H. Brewster, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR.—Filed April 23, 1925

On this twenty third day of April, A. D. 1925, comes Ray C. Simmons, of East Hartford, Connecticut, and says that in the record and proceedings and in the direction of verdict in the above entitled action there is manifest error, to wit:

1. The District Court erred in ruling that the plaintiff failed in his general tender of performance under the (fols. 177 & 178) memorandum of agreement executed by plaintiff and defendant on September 13, 1923, and marked in the trial as "Plaintiff's Exhibit A," in that the plaintiff's wife, under the provisions of Massachusetts law, should have joined with her husband in the transaction in question in duly executing and delivering a mortgage deed upon the real estate described in said memorandum of agreement.

2. The District Court erred in deciding and ruling that there was nothing in the evidence to go to the jury on the question of whether a tender of performance on the part of the plaintiff was prevented or obstructed by the defendant.

3. The District Court erred in deciding and ruling that under the circumstances in this case as established by the

evidence of both the plaintiff and defendant, and by the exhibits and under the relations existing at the time in question between the parties to this action, the defendant was entitled without previous notice or demand to have from the plaintiff a legal tender in money of the sum of twenty-five hundred (\$25,000) dollars after banking hours in Greenfield, Massachusetts, on October 1, 1925.

4. The District Court erred in deciding and ruling that there were no material disputed questions to be determined by the jury.

5. The District Court erred in charging the jury to return a verdict for the defendant.

Wherefore, the plaintiff in error prays that said judgment be set aside and that said cause be remanded to the District Court for the District of Massachusetts for a new trial, in accordance with law.

Plaintiff in Error, by Percy S. Bryant, 847 Main Street, Hartford, Conn.; William J. Malone, Bristol, Conn., His Attorneys.

Bond on writ of error for \$250,000 approved and filed April 23, 1925, omitted in printing.

[fol. 179] Citation, in usual form, showing service on Edward P. Swan, omitted in printing.

[fol. 180] Clerk's certificate to foregoing transcript omitted in printing.

IN UNITED STATES DISTRICT COURT

NOTE RE ORDER ENLARGING TIME

[Memorandum.—An order of enlargement of time for docketing case to and including June 23, 1925, is here omitted. A. I. Charron, Clerk.]

[fol. 181] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FIRST CIRCUIT, OCTOBER TERM, 1925

[Title omitted]

Error to the District Court of the United States for the
District of Massachusetts

Before Bingham, Johnson, and Anderson, JJ.

OPINION—March 3, 1926

BINGHAM, J.:

This is an action for breach of contract entered into between the plaintiff and the defendant on September 13, 1923.

In the declaration, after setting out the citizenship of the parties and the contract, the plaintiff alleged that "at the time specified in said contract the plaintiff was ready, able and willing to perform all acts and things required of him to be done and performed by the terms of said contract, and offered to the defendant so to do and demanded of the defendant that he perform and do the things required of him by the terms of said contract," that "the defendant neglected and refused to perform and do the things required of him by said contract," and that "by reason of said refusal" the plaintiff was damaged.

[fol. 182] According to the contract the defendant was to sell to the plaintiff a lot of land in South Deerfield, Massachusetts, on which was situated a pickle factory, shed and a four tenement building, also two trucks and other equipment on the premises, used by the defendant in the operation of the pickle business, and the good will of the business. For this the plaintiff agreed to pay fifteen thousand dollars as follows: Five hundred dollars by check on the signing of the agreement; twenty five hundred dollars or on before October 1, 1923; and the balance of said purchase price, namely, twelve thousand dollars, by a note of the plaintiff payable to the order of the defendant on demand, with interest at 6 per cent semi annually; and the plaintiff was to execute, acknowledge and deliver to the defendant as security for said note "suitable mortgages, in standard form covering" the above property.

The defendant also agreed to sell to the plaintiff all the pickles he then had in tanks on the premises and the plaintiff agreed to pay therefor the sum of four dollars per thousand, according to the defendant's receipt book as of October 1, 1923. This payment was to be made by the plaintiff's note payable to the order of the defendant on demand, with interest at 6 per cent per annum, which was also to be signed by F. C. Gould and Thomas J. Molunphy as joint makers.

The time set for the performance of the agreement was "on or before October 1, 1923," and the place the office of Davenport & Fairhurst in Greenfield, Massachusetts. And it was further agreed that tender of performance on the part of the defendant would be sufficient if on said date (that is, on or before October 1, 1923) he left with Davenport & Fairhurst for delivery to the plaintiff "a deed and bill of sale" as required by the contract, and that tender of performance on the part of the plaintiff would be sufficient if, within such time, there were left with Davenport & Fairhurst for delivery to the defendant the "sum of Twenty five Hundred (2,500) Dollars" plus the twelve thousand dollar note secured by mortgages and the pickle note. And it was further provided that if the plaintiff failed to perform any of the promises and agreements stipulated, the five hundred dollars, which was to [fol 183] be paid down on the signing of the contract, should be retained by the defendant as liquidated damages. It was also expressly stipulated that "time is of the essence of this contract."

While the declaration alleged that at the time specified in the contract for performance the plaintiff was ready, able and willing to perform all the acts and things required of him to be done and performed, and offered so to do, and contained no allegations of prevention by the defendant of any of the acts and things required of the plaintiff to be done, the plaintiff was permitted, in addition to introducing evidence on the question of performance, to show, if he could, that any requirement wherein he failed was due to his being prevented from performing by the defendant. Undoubtedly the plaintiff could have been limited in his proof to the allegations of his declaration had the defendant so insisted, but, as the trial proceeded without

objection in this particular, no injustice will be done by regarding the plaintiff's declaration as amended to conform to the course pursued at the trial.

At the close of all the evidence, at the court's direction, the jury returned a verdict for the defendant.

The question presented by the assignments of error are (1) whether there was any evidence from which the jury could find that the plaintiff tendered performance in accordance with the terms of the contract so as to put the defendant in default; or (2) if his evidence failed to show tender of performance in a given particular, whether there was any evidence from which the jury could find that, as to that, the defendant prevented him from tendering performance.

The evidence was that the plaintiff resided in the town of East Hartford, Connecticut, and the defendant in South Deerfield, Massachusetts, and that the office of Davenport & Fairhurst, the place where the contract was to be performed, was in Greenfield, Massachusetts; that shortly after September 22, 1923, the defendant received information through the mail that the plaintiff would be at the defendant's place on Monday, October 1, 1923, to carry out the contract; that he would not be there early in the morning as it was election day and he wanted to vote before [fol. 184] leaving; that having this information the defendant went that forenoon with his wife by automobile to Springfield, Massachusetts, and after lunch drove to Westfield, thence to his home at South Deerfield and to the office of Davenport & Fairhurst in Greenfield; that about 12 o'clock Simmons and Gould arrived at the office of Davenport & Fairhurst in Greenfield; that about 2 o'clock the defendant telephoned the office of Davenport & Fairhurst from Westfield to inquire if the plaintiff and the other men were there and to inform them that he was on his way to Greenfield and would probably be there by 3 o'clock; that this information was given to Simmons and Gould; that at 2 o'clock Simmons and Gould consulted a Mr. Lawler, an attorney in Greenfield, about the matter of the contract; that about 3 o'clock or a little thereafter, Simmons, Gould and Lawler were at the office of Davenport & Fairhurst; that Mr. Mumphy, who was to sign the pickle note, left Connecticut about 1 o'clock by automobile and reached the

office of Davenport & Fairhurst a little after 3 o'clock and after Simmons, Gould and Lawler reached there; that the banks in South Deerfield and Greenfield closed at 3 o'clock; that the defendant arrived at the office of Davenport & Fairhurst somewhere from 4.15 to between 5 and 6 o'clock, having his wife with him; that he had previously signed and left with Davenport & Fairhurst the bill of sale called for by the contract and the deed of the real estate; that his wife that day signed the deed; that after the wife signed the deed the plaintiff and defendant fixed upon the sum for which the pickle note should be filled out; that the pickle note was made and signed as was also the note for twelve thousand dollars that went to make up the purchase price for the real estate and pickle business, and the mortgages on the real estate and personal property (not including the pickles) were signed; that a discussion was had as to defendant's engaging in a competing business, but this matter was disposed of by inserting in the bill of sale an agreement that he should not compete for a period of fifteen years; that there was further discussion as to the time when the defendant would require payment of the demand notes, which rendered doubtful the prospect of the plaintiff (fol. 185) tiff carrying out the contract, but the plaintiff finally decided that he would go through with the deal and tendered to defendant a check or certificate of deposit on the Produce National Bank of South Deerfield for the twenty-five hundred dollars, together with the mortgages and the two notes; that Swan declined to accept the check or certificate, insisting on money or cash, but neither the plaintiff nor those with him had the money; that the check or draft tendered was payable to F. C. Gould.

The provision in the contract whereby the plaintiff agreed to pay the sum of twenty-five hundred dollars as a part of the consideration for the pickle plant legally means that the plaintiff agreed to pay that amount in cash (*Pearlstein v. Novitch*, 239 Mass. 228; *Vick v. Howard*, 136 Va. 101, 108) and the plaintiff, having failed to tender cash or legal tender, was in default and cannot recover unless there was evidence from which it could be found that the defendant prevented the plaintiff from making a proper tender in cash. *Servel v. Jamieson*, 255 Fed. 892; *Breed v. Hurd*, 6 Pick. 356.

We think there was no evidence on which such a finding could be based. The defendant was under no obligation to notify the plaintiff in advance that he would require cash. The plaintiff was bound to know that cash was required to meet his obligation. The jury would not have been warranted in finding that the defendant prevented the plaintiff from tendering the cash at the place named for performance from the fact that the defendant did not arrive at the office of Davenport & Fairhurst until some time between 4 and 6 o'clock and after the banks were closed. The plaintiff could have brought the money with him from Connecticut, obtaining it at the bank in South Deerfield where he procured the certified check or even obtained it in Greenfield before the closing of the banks, for he knew at 2 o'clock or thereabouts that the defendant would not arrive in Greenfield to consummate the trade until 3 o'clock or thereafter.

The judgment of the District Court is affirmed, with costs to the defendant in error.

[Vol. 186] IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION

ANDERSON, J. (dissenting:)

In this case the result reached is grossly unjust to the plaintiff. More important, the decision commits this court to a rule of law entirely inconsistent with modern business practices, and which will inevitably operate to promote trickery and unfair dealing. It tends to destroy the obligation of contracts, the enforcement of which is one of the main duties of courts of justice. Law, as a right enforcer, ought not to be allowed to drag, unnecessarily, behind the established, honest, practices of the business community.

The agreement required that "\$2,500 * * * be paid" by the plaintiff. He tendered a check, certified by a bank of conceded soundness, in exact accordance with the established practices in the overwhelmingly majority of commercial transactions involving any substantial amount. He is now held to have lost his bargain because he did not pro-

cure and tender, long after the close of banking hours, legal tender for \$2,500.

It is elementary that tender is waived whenever the prospective payee "in any way obstructs or prevents a tender." See 38 Cyc. 136. Estoppel may well be the more applicable term. The gist is that the defendant left the plaintiff without the slightest reason to expect that payment by the usual method in all substantial business transactions would not be accepted. Cf. *Shutte v. Thompson*, 15 Wall. 151, 159, 160; *Wight v. Davidson*, 181 U. S. 371, 377; *Mutual Life Ins. Co. v. Hill*, 193, U. S. 551, 560; *Baker v. Humphrey*, 101 U. S. 495. In my opinion there was abundant evidence in this case for the jury of such waiver or estoppel. The defendant's motive to escape from his contract was obvious, for, because of a frost, the stock of pickles he was selling were then worth substantially more than the contract price. He did not reach the place agreed upon for completing the trade until after the close of ordinary business hours. This was a most significant fact. It was at least six or seven o'clock in the evening before the papers were ready to be passed. Then, for the first time, the defendant refused to accept the plaintiff's certified check, demanded cash, and, failing to get it, left the office. There [fol. 187] were other facts and circumstances tending to show that defendant sought and found (as is now in effect held) a chance to trick the plaintiff out of rights arising under any fair and honest code of business ethics.

The case for the plaintiff is at least as strong as in *Servel v. Jamieson*, 255 Fed. 852, where the Court of Appeals for the Ninth Circuit reversed a ruling of the District Court like the one made by the court below in this case, holding the case was for the jury.

I find no case which, on fair analysis of the facts, goes so far in support of an inappropriate and unnecessarily technical rule as does the decision of the majority in this case. This decision extends a rule that should be narrowed. What the business community generally understands the word "payment" to mean should, so far as possible, be its meaning in law. At any rate, attempts to escape performance of contract obligations by invoking technicalities of this sort call for a liberal interpretation of the doctrine of estoppel and the submission of all questions of fact to the conscience and intelligence of the jury.

[fol. 188] On January 6, 1926, this cause came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable Charles F. Johnson and Honorable George W. Anderson, Circuit Judges, sitting.

Thereafter, to wit, on the third day of March, A. D. 1926, the opinion of the court (page 181) was announced, a dissenting opinion by Anderson, J. (page 186) was filed and the following Judgment was entered.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT — March 3, 1926

This cause came on to be heard January 6, 1926, upon the transcript of record of the District Court of the United States for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now, to wit, March 3, 1926, here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed, with costs to the defendant in error.

By the Court,

Arthur L. Charron, Clerk.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION FOR STAY OF MANDATE — Filed May 6, 1926

Now comes Ray C. Simmons, plaintiff in error, in the above entitled cause, and represents to this Honorable Court that he intends to file a petition in the Supreme Court of the United States for a writ of certiorari.

Wherefore, the said Ray C. Simmons, plaintiff in error, moves that the issue of the mandate in the above entitled cause be stayed pending the determination by said Supreme Court of his petition for said writ, or until the further order of this court.

Ray C. Simmons, Plaintiff in Error, by His Attorneys Percy S. Bryant, Samuel D. Elmore,

[Vol. 189] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—May 6, 1926

Upon motion of the plaintiff in error, it is ordered that the mandate herein be, and the same hereby is, stayed until further order of court, upon the condition that said plaintiff in error files within two weeks a petition for writ of certiorari in the Supreme Court of the United States.

By the Court

Arthur I. Chaffron, Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

[Vol. 190] IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as through filed in response to such writ.

No. 1 ~~25~~ 3 ~~25~~ 65

In the
Supreme Court
of the
United States

Office Supreme Court,
F. I. L. 20 13

MAY 17 192

W. R. STANB
C

RAY C. SIMMONS

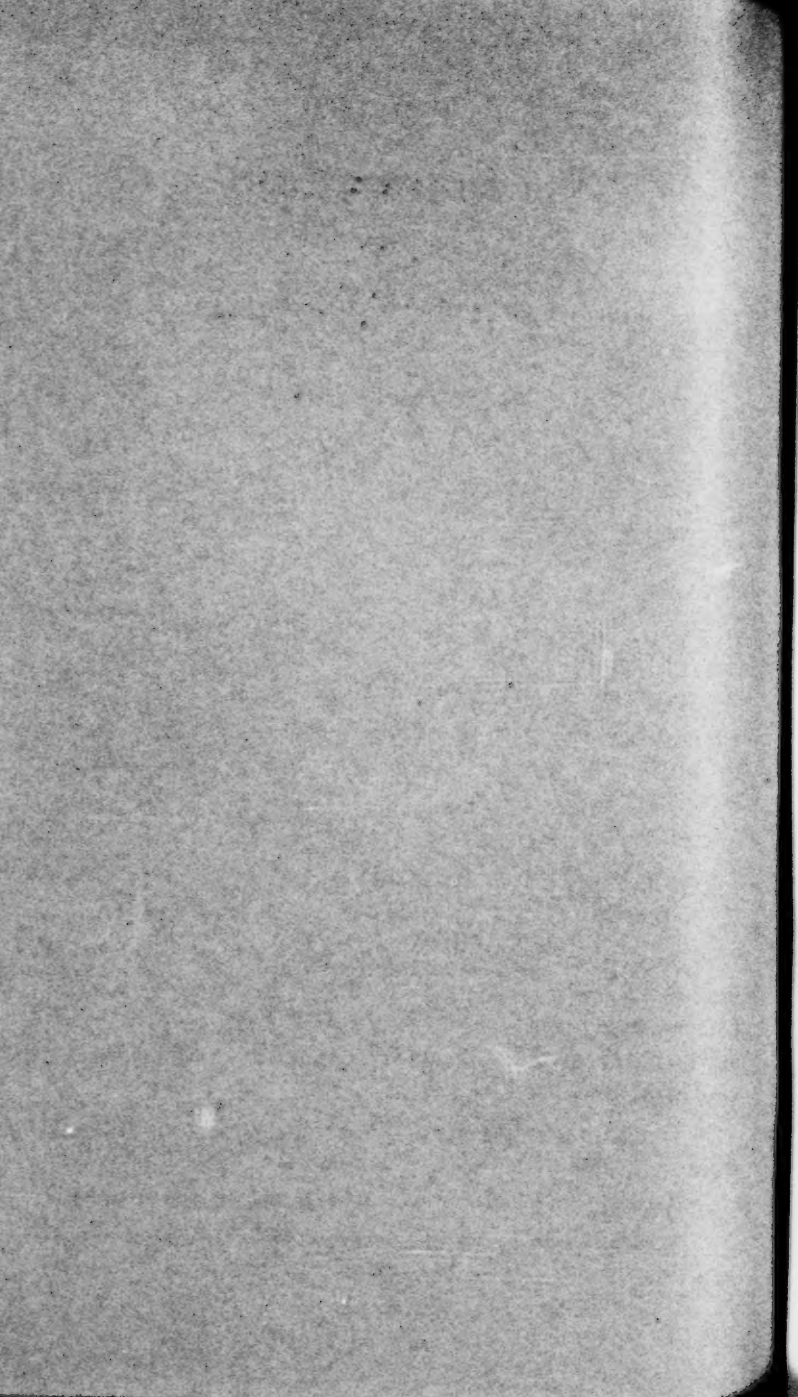
VS.

EDWARD P. SWAN

Petition for Writ of Certiorari

to the

United States Court of Appeals for the First Circuit

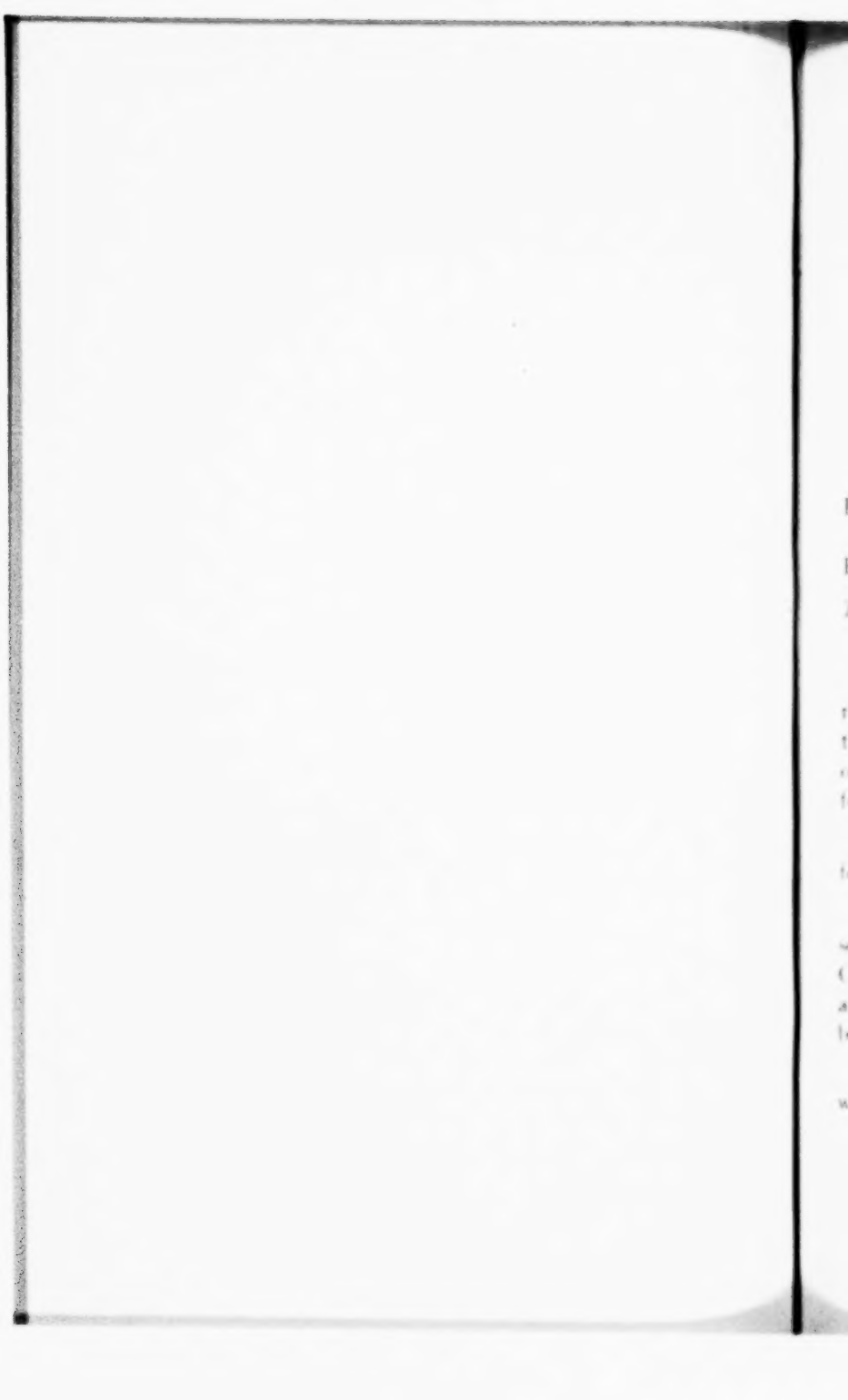


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**The Supreme Court
of the
United States**

October Term, 1925.

Ray C. Simmons, Petitioner,

vs.

Edward P. Swan, Respondent.

*To the Honorable the Chief Justice and Associate Justices of
the Supreme Court of the United States.*

Your petitioner, Ray C. Simmons, respectfully represents that he brought his action against the Respondent to the District Court of the United States for the District of Massachusetts, on account of diversity of citizenship, for recovery of damages for breach of contract.

Said action was heard before a jury and a verdict for the defendant was rendered by direction of the Court.

Upon the pleadings and a Bill of Exceptions duly settled, the case was taken by Writ of Error to the Circuit Court of Appeals for the First Circuit which court affirmed the decision of the District Court by a divided bench, March 3, 1926.

The issues before the Circuit Court of Appeals were

Was the trial court justified in directing a verdict or was there evidence from which the jury might determine

First, whether the plaintiff had performed all things required by him to be performed and therefore was entitled to a verdict.

Second, whether, if plaintiff had failed to perform, was performance prevented or obstructed by defendant.

Third, whether the conduct and actions of the defendant were such as to estop him from demanding from the plaintiff, in connection with documentary performance, pecuniary performance in legal tender dollars in lieu of the dollars ordinarily employed in commercial transactions.

The Petitioner insists that the decision of the Circuit Court of Appeals should be reversed because:

(1) in the language of Judge Anderson, dissenting, "The result reached is grossly unjust to the plaintiff. More important, the decision commits this Court to a rule of law entirely inconsistent with modern business practices, and which will inevitably operate to promote trickery and unfair dealing. It tends to destroy the obligations of contracts, the enforcement of which is one of the main duties of courts of justice. Law, as a right-enforcer, ought not to be allowed to drag unnecessarily behind the established, honest practices of the business community," and because

(2) the decision of the Circuit Court of Appeals deprives the plaintiff of his constitutional right to have determined by a jury the question of fact as to whether or not the conduct and action of the defendant did, in fact, constitute an obstruction or prevention of tender of performance of the contract by the plaintiff, and because

(3) the admitted error by the trial judge in construing the state law of Massachusetts that a wife must join with her husband in the execution of a purchase price mortgage deed so influenced and warped his judgment as applied

to the other questions in issue as to create a conclusion relating to the other issues which was unjust and unfair to the plaintiff, and because

(4) there was evidence to go to the jury to establish breach of contract and deceit on the part of the defendant when said evidence induced the trial judge to make the following observations during the course of the trial.

"It is perfectly obvious that he (the defendant) was trying to get out from under his contract," and

"Your man (the defendant) was pretty careful to keep away until the banks were closed."

And again after a statement made by counsel that the certificate of deposit was as good as cash, the Court said

"It happened to be. There were no grounds to think it wasn't. I agree that his (the defendant's) attitude was entirely unreasonable and taken by a man who wanted to escape his honest obligations", and because

5) whether or not the conduct and action of the defendant did estop him from demanding from the plaintiff \$2500 in legal tender money in lieu of a certificate of deposit issued by a national bank of admitted solvency which was tendered to him.

Your Petitioner believes that the aforesaid judgment of the Circuit Court of Appeals is erroneous, and that this honorable court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such cases made and provided.

Wherefore, your Petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court

of Appeals for the first circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled Ray C. Simmons, Plaintiff, Plaintiff in Error, vs. Edward P. Swan, Defendant, Defendant in Error, No. 1869, to the end that the said case may be reviewed and determined by this court as provided in Judicial Code, Sec. 240, or that your Petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this honorable court.

And your Petitioner will ever pray.

RAY C. SIMMONS, *Petitioner.*

By PERCY S. BRYANT,
Counsel.

STATE OF CONNECTICUT,)
COUNTY OF HARTFORD,) ss.

Percy S. Bryant, being duly sworn, says that he is one of the counsel for Ray C. Simmons, the petitioner, that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

PERCY S. BRYANT.

Subscribed and sworn to before me by Percy S. Bryant this, the 11th day of May, A. D. 1926. My commission expires February 1st, 1929.

MORRIS S. FALK,
Notary Public, Hartford County, Connecticut.

SUPPORTING BRIEF

1. The decision in this case is in conflict with the decision of the case of *Servil vs. Jamieson* decided in the Ninth Circuit. This conclusion is supported by the dissenting opinion of Mr. Justice Anderson who says, "The case for the plaintiff is at least as strong as in *Servil vs. Jamieson*, 255 Fed. 852, where the Court of Appeals for the Ninth Circuit reversed the ruling of the District Court like the one made by the Court below in this case, holding the case was for the jury.

2. The writ of certiorari should issue in this case because the decision has decided an important question of general law in a way probably untenable as applied to modern business practices. In the words of Mr. Justice Anderson dissenting, "I find no case which on fair analysis of the facts go so far in support of an inappropriate and unnecessarily technical rule as does the decision of the majority in this case. This decision extends a rule that should be narrowed. What the business community understands the word "payment" to mean should so far as possible be its meaning in law. At any rate, attempts to escape performance of contract obligations by invoking technicalities of this sort call for a liberal interpretation of the doctrine of estoppel and the submission of all questions of fact to the conscience and intelligence of the jury."

3. The writ of certiorari should issue because, in the words of the dissenting opinion, "The decision commits this court to a rule of law entirely inconsistent with modern business practices and which will inevitably operate to promote trickery and unfair dealing. It tends to destroy the obligation of contracts, the enforcement of which is one of the main duties of courts of justice. Law, as a right enforcer, ought not to be allowed to drag unnecessarily behind the established, honest practices of the business community." After careful consideration of the

record, Mr. Justice Anderson reached the conclusion that "in this case the result reached is grossly unjust to the plaintiff."

4. The writ of certiorari should issue because the Circuit Court of Appeals erred in construing the provision of the contract which required that \$2500, in view of the preceding relations, customs and precedents between the parties, meant, so far as the transaction in question was concerned, legal tender money when examination of the record will disclose that the defendant not only had accepted the plaintiff's check for a substantial amount theretofore but had by letter requested the payment by check of \$15,000, a sum six times as great as the amount for which the defendant afterwards demanded legal tender in payment thereof. Not only in accordance with the practice that had been previously established between the parties but in exact accordance with the established practices in the over whelming majority of commercial transactions involving any substantial amount, the plaintiff in good faith tendered to the defendant not alone his own check but actually made physical tender of a certificate of deposit on a national bank of conceded soundness.

5. The writ of certiorari should issue because the defendant, by his actions and his letter asking for a check from the plaintiff for a much greater amount, estopped himself from demanding legal tender in the amount of \$2500. In the words of the dissenting opinion, "The gist is that the defendant left the plaintiff without the slightest reason to expect that payment by the usual method in all substantial business transactions would not be accepted. Cf. *Shutte v. Thompson*, 15 Wall. 151, 159, 160; *Wight v. Davidson*, 181 U. S. 371, 377; *Mutual Life Insurance Co. v. Hill*, 193 U. S. 551, 560; *Baker v. Humphrey*, 101 U. S. 495.

6. The writ of certiorari should issue because there was substantial evidence in this case for the jury of waiver

or estoppel. In the words of the dissenting opinion, "In my opinion there was abundant evidence in this case for the jury of such waiver or estoppel. The defendant's motive to escape from his contract was obvious; for, because of a frost, the stock of pickles he was selling were then worth substantially more than the contract price. He did not reach the place agreed upon for completing the trade until after the close of ordinary business hours. This was a most significant fact. It was at least six or seven o'clock in the evening before the papers were ready to be passed. Then, for the first time, the defendant refused to accept the plaintiff's certified check, — demanded cash, and, failing to get it, left the office."

7. The writ of certiorari should issue because a court of justice is placed in a position where it is made to appear to lend itself to the promotion of trickery and fraud. In the words of Mr. Justice Anderson dissenting, "There were other facts and circumstances tending to show that the defendant sought, and found (as is now in effect held), a chance to trick the plaintiff out of rights arising under any fair and honest code of business ethics."

Such a condition of affairs certainly calls for an exercise of this court's power of supervision.

PERCY S. BRYANT,
WILLIAM J. MALONE,
MORRIS S. FALK,

Counsel.

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**In the Supreme Court
of the
United States**

**October Term, ~~1926~~ 1927
(~~No. 377~~) (No. 65)**

RAY C. SIMMONS, Petitioner,

VS.

EDWARD P. SWAN,

STATEMENT OF THE CASE

This case is here on writ of certiorari to review a decree of the Circuit Court of Appeals for the First Circuit affirming a verdict by Jury for the defendant rendered by direction of the Court in the District Court of the United States for the District of Massachusetts for recovery of damages for breach of contract.

The Petitioner is a resident of Connecticut, and the Respondent is a resident of Massachusetts. The action was brought in the United States District Court on account of the diversity of citizenship. The action was heard before a Jury, and a verdict for the defendant was rendered by direction of the Court.

The Bill of Complaint sets forth as Exhibit "A" a written contract between the parties, providing for the purchase and sale of a pickle business, with real estate and pickle stock, and alleges that at the time specified in the contract the plaintiff was ready, able and willing to perform all acts and things required of him to be performed by the terms thereof and that the defendant neglected and refused to perform and do the things

required of him by the contract, and claims by reason of said refusal on the part of the defendant damages in the amount of \$25,000. The Answer denied each and every material allegation in the plaintiff's writ and declaration. (Said action was heard before a Jury and a verdict for the defendant was rendered by direction of the Court.)

Upon the pleadings and a Bill of Exceptions duly settled, the case was taken by writ of Error to the Circuit Court of Appeals for the First Circuit, which Court affirmed the decision of the District Court by a divided Bench, March 3, 1926. The issues before the Circuit Court of Appeals were:

Was the trial Court justified in directing a verdict or was there evidence from which the Jury might determine:

First, Whether the plaintiff had performed all the things required of him to be performed and therefore was entitled to a verdict.

Second, Whether, if the plaintiff had failed to perform, was performance prevented or obstructed by the defendant.

Third, Whether the conduct and actions of the defendant were such as to estop him from demanding from the plaintiff in connection with documentary performance, pecuniary performance in legal tender dollars in lieu of the dollars ordinarily employed in commercial transaction.

PETITIONER'S SPECIFICATION OF ASSIGNED ERRORS

First. The Circuit Court erred in deciding that there was nothing in the evidence to go to the Jury on the question whether the tender of performance on the part of the plaintiff was prevented or obstructed by the defendant.

Second. The Circuit Court erred in deciding that under the circumstances in the case, as established by the evidence, the defendant was entitled without previous notice or demand to have from the plaintiff a legal tender in money of the sum of \$2500.00 after banking hours in Greenfield, Massachusetts, on October 31st, 1923.

Third. The Circuit Court erred in deciding that there were no material disputed questions to be determined by the Jury, and that the District Court was justified in charging the Jury to return a verdict for the defendant.

Fourth. The Circuit Court erred in failing to hold that the trial court, in deciding that the plaintiff failed in his general tender of performance, was influenced by the erroneous claim of the defendant that under the provisions of Massachusetts law, the plaintiff's wife should have joined with the plaintiff in executing a purchase money mortgage of real estate.

ARGUMENT

The vital question in this case is whether there was evidence pro and con before the Jury from which it could determine whether or not the plaintiff was able, ready and willing to perform his contract, and if he failed in any particular whether or not such failure was caused by the defendant and due to his acts or omissions.

By the terms of the contract, Record Page 5 Exhibit A, the plaintiff was required:

1. To pay \$5000.00
2. To pay \$2500.00
3. To make his demand note for \$12,000.00
4. To execute a mortgage of the real estate purchased securing the payment of his \$12,000.00 note.
5. To execute a mortgage of the personal property

purchased as collateral security for the payment of the unpaid purchase money.

6. In conjunction with his associates in The Silver Lane Pickle Company, Messrs. Gould and Molumphy, to execute a demand note for whatever sum should be determined to be the amount of the purchase price of the pickles in stock.

The defendant was required

1. To execute with his wife a deed of real estate
2. To execute a bill of sale of certain personal property.

The plaintiff and defendant, jointly, were required

1. To determine from the books of the defendant the number of pickles in stock
2. To compute the amount to be paid therefor at the rate of \$4.00 per thousand

Within the time limited and at the place specified, viz. on Monday, October 1st, 1923, at the law office of Davenport & Fairhurst, in Greenfield, Massachusetts, certainly by noon, the plaintiff appeared, and as he claims, able, ready and willing to perform his part of the contract.

This Court will note

1. That up to the time of the appearance of the plaintiff at the office of Davenport & Fairhurst, the amount of the note to be given for the pickle stock had not been determined.

2. That the plaintiff had with him his two associates in The Silver Lane Pickle Company, Messrs. Gould and Molumphy, who were required to sign, as makers, the note to be given for the pickle stock.

3. That no information could be obtained regarding the whereabouts of the defendant.

4. That Mr. Fairhurst declined to do any business with the plaintiff until the arrival of the defendant.

5. That the defendant, although promising by telephone to be present at three o'clock, did not arrive until long thereafter, and not until long after the close of banking hours, and did not ask for money until seven o'clock.

6. That not until after the defendant's arrival at the office of Davenport & Fairhurst was his deed of the real estate executed.

7. That the defendant knew, or at least supposed, the pickles were purchased for The Silver Lane Pickle Company.

8. That defendant asked The Silver Lane Pickle Company for its check for approximately \$15,000.00 in payment for said pickle stock.

9. That defendant refused to accept a check or obligation for \$2500.00 issued by The Produce National Bank of South Deerfield, Massachusetts, a town in which the defendant was a resident, and a bank so well known and so reliable that the Court declined to hear evidence as to its solvency.

10. That the refusal to accept this obligation was so late in the day that the plaintiff or his associates could not exchange the obligation at a Greenfield bank, or at South Deerfield, twenty minutes away by automobile, for currency.

11. That if this bank obligation had been refused earlier in the day, when the defendant's agent, Mr. Fairhurst, at the time and place specified for "tender of performance" had refused to do any business until the defendant arrived, the plaintiff could easily have exchanged it for "money."

12. That from the inception of this transaction

several weeks before September 13th until the instant of its termination in the evening of October 1st the word "money" never was mentioned.

13. That in the preliminary negotiations in the drafting of the contract; in investigation of the defendant's books to determine the selling price of pickles in stock; during the long and tedious wait at the office of Davenport & Fairhurst for the arrival of the defendant; during the discussion of details after the defendant's arrival; and not until it was apparently certain from the lateness of the hour that all banks were closed, was "money" mentioned.

14. That checks, and personal checks at that, as distinguished from bank obligations, were the only medium of exchange used or suggested by the plaintiff and defendant.

15. That the defendant even asked in writing for a check of approximately \$15,000.00, in lieu of a note for like sum (Record Page 28).

16. That pickles in stock, by reason of the destruction by frost of the major part of the crop, had vastly increased in value between September 13th, the date of the execution of the contract, and October 1st, the date for consummation thereof.

We think it well settled law that if one party to a contract refuses to perform his agreement, the other party can recover compensation for the injury he suffers by such refusal, and we think it equally well settled law that if one party to a contract is prevented from performing his part of the contract by the other party to the contract he can still recover whatever damages he suffers.

We contend that if one party to a contract is hindered, obstructed or prevented from effecting performance of his part by the other party he can recover.

In the trial of an action where there is conflicting testimony as to whether or not the plaintiff was ready, able and willing to perform all acts and things required of him to be done and performed, and as to whether or not the defendant neglected and refused to perform and do the things required of him, it is the *province of the Jury* to weigh the testimony and determine the facts.

If any substantial testimony in this case was offered to prove that any failure on the part of the plaintiff was due to hindrance, obstruction or prevention of the defendant, it was the *province of the Jury* to weigh such testimony and to determine its effect; and we respectfully contend that the Court erred

- (a) In depriving the Jury of this function
- (b) Substituting its own conclusion for any conclusion the Jury might have reached
- (c) In directing the Jury to reach a certain conclusion.

The Courts have discussed the question of "tender of performance" in cases of mutual and concurrent promises.

In *Smith vs. Lewis*, 26 Conn. 409, at page 419, the Supreme Court of Connecticut said,

"Some misapprehension or confusion appears to have arisen from the mode of expression used in the books in treating of the necessity of a tender or offer by the parties, as applicable to the case of mutual and concurrent promises. The word "tender", as used in such a connection, does not mean the same kind of offer as when it is used with reference to the payment or offer to pay an ordinary debt due in money, where the money is offered to a creditor who is entitled to receive it and nothing further remains

to be done, but the transaction is completed and ended, but it only means a readiness and willingness, accompanied with an ability on the part of one of the parties to do the acts which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do; and a notice by the former to the latter of such readiness. Such readiness, ability, and notice are sufficient evidence of, and indeed constitute and imply, an offer or tender in the sense in which those terms are used in reference to the kind of agreements which we are now considering. It is not an absolute, unconditional offer to do or transfer anything at all events, but it is in its nature conditional only, and dependent on, and to be performed only in case of, the readiness of the other party to perform his part of the agreement."

This decision has been quoted with approval, and so far as we know has never been disapproved.

In *Clark vs. Weis*, 87 Ill. 438, the exact language is quoted in extenso.

The Petitioner respectfully insists that the decision of the Circuit Court of Appeals be reversed because

(1) In the language of Judge Anderson, dissenting, "The result reached is grossly unjust to the plaintiff. More important, the decision commits this Court to a rule of law entirely inconsistent with modern business practices, and which will inevitably operate to promote trickery and unfair dealing. It tends to destroy the obligations of contracts, the enforcement of which is one of the main duties of courts of justice. Law, as a right enforcer, ought not to be

allowed to drag unnecessarily behind the established, honest practices of the business community," and because

(2) The decision of the Circuit Court of Appeals deprives the plaintiff of his constitutional right to have determined by a jury the question of fact as to whether or not the conduct and action of the defendant did, in fact, constitute an obstruction or prevention of tender of performance of the contract by the plaintiff, and because

(3) The admitted error by the trial judge in construing the state law of Massachusetts that a wife must join with her husband in the execution of a purchase price mortgage deed so influenced and warped his judgment as applied to the other questions in issue as to create a conclusion relating to the other issues which was unjust and unfair to the plaintiff. [Record Page 193].

(4) There was evidence to go to the Jury to establish breach of contract and deceit on the part of the defendant when said evidence induced the trial judge to make the following observations during the course of the trial:

✓ It is perfectly obvious that he (the defendant) was trying to get out from under his contract." [Record Page 69].

"Your man (the defendant) was pretty careful to keep away until the banks were closed." [Record Page 70].

And again after a statement made by counsel that the certificate of deposit was as good as cash, the Court said:

"It happened to be. There were no grounds to think it wasn't. I agree that his (the defendant's) attitude was entirely unreasonable and taken by a man who wanted to escape his honest obligations." (Record Page 71).

5. Whether or not the conduct and action of the defendant did estop him from demanding from the plaintiff \$2500 in legal tender money in lieu of a certificate of deposit issued by a national bank of admitted solvency which was tendered to him.

We contend that under the authority of cases such as *Smith vs. Lewis*, 26 Conn., 109; *Clark vs. West*, 87 Ill., 438.

the plaintiff was clearly not bound to execute a mortgage of real estate not yet conveyed to him; to pay the defendant more money for that real estate to issue and put into circulation his note for twelve thousand dollars in addition to the \$5000 already paid; to pay for the personal property mentioned in the contract and to obligate himself and his associates to pay approximately \$15,000 for the pickles in stock unless and until the defendant was ready to convey the real estate to the plaintiff and give him possession or proper munitments of title of the personal property as provided in the contract.

A readiness by the plaintiff to perform provided the defendant was also ready, with notice to the defendant to that effect, was equivalent to what his contract called upon him to do.

We contend that the plaintiff was not only willing and ready to perform but he was also *able*.

He was not called upon merely to pay a debt or to satisfy a simple monetary obligation. He was required

to do a number of different things arising from mutual and concurrent promises. Besides issuing notes for approximately twenty-seven thousand dollars he was to turn over less than one-tenth of this sum not specifically in cash, specie, legal tender or bank bills, but in the language of the contract in "dollars".

This sale and purchase was a commercial transaction not at all differing from an every day affair. The parties in interest are ordinary business men. The word "dollars" had for them no technical meaning. They used it in this contract the same as they used it in their ordinary business commercial transactions.

It is within bounds to say that at least ninety per cent of all their monetary transactions are in the same medium as that used in the general commercial world. Actual currency is but a drop in the bucket when compared with the transactions by check and other forms of bank credit. The fact that the plaintiff had the commercial equivalent of "dollars" in the form of a bank obligation issued by a well known substantial National Bank in lieu of paper or silver or gold "dollars" was absolutely immaterial unless and until the defendant gave the plaintiff some intimation that he would not accept "dollars" used in ordinary commercial transactions but would insist upon having "dollars" of a different kind.

This notice the defendant failed to give until it was too late in the day to exchange the "dollars" which the plaintiff had for the "dollars" which the defendant demanded.

Our contention is sustained in a comparatively recent case (1919) decided by the Circuit Court of Appeals for the 9th Circuit.

Servel vs. Jamieson, 255 Federal 892.

In this case the plaintiff had contracted for a large

number of lambs at a certain price per pound to be weighed and paid for at a future date. At the time of making the contract a substantial amount had been paid by check. Between the making and date fixed for performance the market value of lambs had materially increased. Time had been made of the essence of the contract. On the day for the completion of the contract the parties met, the weighing of the lambs was completed and the amount to be paid was determined.

The plaintiff was not present in person, but was represented by an agent named Stitt, who was directed by one of the defendants to go to the home of the other defendant for settlement. Arriving there the defendant sought was not to be found. The agent then returned, found both defendants, and offered a check in settlement, which the defendants refused to accept. Several hours had been consumed in the travel and meantime the banks had closed, the day being Saturday. The check offered in settlement was good and could have been converted by the plaintiff into cash had the refusal of acceptance been made during banking hours.

Suit was brought to recover damages, and these facts being proved, the Court directed a verdict for the defendant.

The Circuit Court of Appeals in reversing the judgment rendered upon this verdict said:

We think that the defendants stood strictly within their rights in refusing the check which was tendered by Stitt. It is the well settled rule that the tender of a check in payment of money is of no effect in cases where objection is made to that medium of payment. (Cases cited). Nor should it be held that the defendants by accepting a check for the payment made at the time of entering into the contract bound themselves

to accept a check at the final performance thereof or waived the right to demand that the final payment be made in currency. The case is unlike *Gunby vs. Ingram*, 57 Wash., 97, etc., where a series of payments of interest on a mortgage had been made by check and it was held that the tender of a check for another installment was sufficient to prevent the exercise of an option to declare the whole debt due.

"In the present case, the defendants might well accept a check for the first payment for they parted with no right of possession of the property contracted to be sold, but when it came to the final payment and the delivery of the property to the plaintiff to be taken out of the state they were entitled to demand that they be paid in money and not by a check upon a bank in a sister state.

"Time was expressly made of the essence of the contract and by the agreement of the parties the contract was to be fully performed on September 29, 1917.

"This was not done but there was testimony tending to prove that on September 29th, after the lambs had been weighed at 8 o'clock in the morning the defendants avoided the plaintiff's agent and delayed meeting him for the final settlement until after four o'clock in the afternoon.

"A tender is waived where the person to whom it is to be made 'in any way obstructs or prevents a tender' "

38 C.Y.C. 135, *Hunt on Tender*, Sec. 52

Schaeffer vs. Coldren, 237, Pa. 77, 85

Ad. 98, Ann. Cas. 1914B, 175

"In view of these features of the evidence and the plaintiff's offer of proof from which the jury might have found that but for such delay the currency might have been obtained to make payment on the day, we think it was error to direct the jury to return a verdict for the defendants.

"The Judgment is reversed and the cause is remanded for a new trial."

The case at bar differs from *Servel vs. Jamieson* above only in that in the latter the obstructing and preventing a tender of performance occurred *after* all things had been done except actual payment while in the case at bar the obstructing and preventing occurred *before* the time for actual payment and before the plaintiff even knew all that he must do to tender performance.

The plaintiff was entitled to have the jury decide whether or not Swan knowing the plaintiff was coming that day, kept away for any ulterior purpose and whether Mr. Fairhurst's refusal to do business until his principal arrived was in fact an obstruction and prevention. Mr. Fairhurst may have been perfectly innocent of any wrong doing, but considering the relation of principal and agent between Swan and him, the plaintiff was entitled to have the jury determine whether his acts did, as a matter of fact obstruct and prevent.

In considering the acts of persons, the elements of good faith and common honesty are important.

It is not the province of Courts to aid a litigant to avoid his honest obligations. It is not for the Court to prevent the jury from saying whether or not certain proven acts hindered or obstructed. Nor is it for the Court to determine whether or not the evidence proves certain facts. While the admissibility of the evidence is a matter for the Court, its weight, importance and con-

In support of our contention that tender is waived where the person to whom it is to be made in any way obstructs or prevents a tender, reference is called to the case of *Cheney vs. Libby*, 134 U. S. 68-79 where Justice Harlan, delivering the opinion of the Court, said

"The question to be determined is, whether there was any such default upon the part of the plaintiff, Libby, as deprived him of the right of specific performance.***** Although the contract between Cheney and Libby called for payment in dollars, the latter might well have supposed, unless distinctly informed to the contrary, that the former would be willing to receive current funds, that is, such as are ordinarily received by men of business or by banks. * * * While this course of business was not an absolute waiver by Cheney of his right to demand coin or legal tender paper in payment of notes subsequently falling due, such conduct, * * * was calculated to produce the impression upon Libby's mind that current or bankable funds would be received * * * and, therefore, upon every principle of fair dealing, Cheney was bound to give reasonable notice of his purpose * * to accept only such funds as under the contract, strictly interpreted, he was entitled to demand. No such notice was given. On the contrary, the just inference from the testimony is, that Cheney designed to throw Libby off his guard, and rendered it impossible for the latter * * * to supply the requisite amount of coin or legal tender paper on the very day the notes matured, and at the moment of their presentation for payment. * * * To permit Cheney, under the circumstances disclosed, to enforce a forfeiture of the contract would enable him to take advantage of his own wrong, and to reap the fruits of a scheme formed for the very purpose of bringing about the non-performance of the contract."

While the facts in the case above cited differ in degree from the case at bar, the principle announced by this Court is on all fours with the claims made by this plaintiff that the defendant should not be permitted to avoid his just obligations under a contract by insisting upon the payment of legal tender money when he had misled the plaintiff into believing that legal tender money would not be demanded.

In support of this doctrine, and on waiver of tender, see also *Williston on Contracts* (1922) Section 1819.

sequences are matters for the jury. The Court has ultimate control of any misuse of this power by the jury by refusing to accept a verdict of the jury or by setting it aside after acceptance.

Silver certificates and National bank bills, as well as legal tender government notes are indiscriminately used by everybody who is fortunate enough to have either and, even if the plaintiff had twenty-five hundred dollars in cash in his pocket, the defendant could have refused to take it if one of the bills chanced to be a silver certificate or a five dollar bill issued by the National bank in which he kept his deposit. Would any Court under the circumstances of this case on account of that five dollar bill allow this defendant to avoid his honest obligations? A five dollar bill issued by The Produce National Bank of South Deerfield, Massachusetts, was no better or no worse, as far as its nature is concerned, than a twenty-five hundred dollar certificate of deposit issued by the same bank.

Cashier's checks from their peculiar character and general use in the commercial world, are regarded substantially as the money which they represent, a rule that is not extended to the case of ordinary checks of the depositor drawn on his bank.

Ruling Case Law, Vol. 5, Pg. 484 (bottom)

Hathaway vs. Delaware County 185 N. Y. 368,

78 N. E. 153, 13 L. R. A. (N. S.) 273

When time is not of the essence of the contract, neither party can rescind or claim a violation of the contract after performance becomes due without giving the other party an opportunity to make tender of performance. On the other hand, the duty is imposed on the other party to the contract to make within a reasonable time after the performance is due, a tender of performance

unless excused therefrom by the attitude of the first party.

It is therefore clear that if it were not for the fact that the contract in question in this case contains a clause whereby time is made of the essence of the contract, the defendant, under the circumstances of this case, would not have had any right whatever to declare the contract forfeited on the part of the plaintiff. The only question then is, whether or not under the circumstances of this particular case, with such a clause as the above mentioned in the contract, the defendant was justified in declaring the contract forfeited and entitled to retention of the \$800 plus the value of the salt used in the attempt by the plaintiff to protect the property which he had purchased under the contract.

Any forfeiture of the contract in question as sought to be made by the defendant would be manifestly unfair and unconscionable and should not be permitted. The plaintiff in good faith visited the premises of the defendant, looked over the pickle stock with the defendant, and at the instigation of the defendant, but at expense to himself, sent from East Hartford, Connecticut, to South Deerfield, Massachusetts, a ton of salt and occasioned the deposit of this salt in the brine solution in the pickle vats, so that the cucumber pickles might be preserved.

The plaintiff, on October 1st, 1928, at about the hour of ten o'clock A. M., arrived at the place of business of the defendant in South Deerfield, Massachusetts, and attempted to consummate the deal. Finding the office of the defendant locked, the plaintiff called at defendant's home, where he could get no information whatever as to the whereabouts of the defendant. The plaintiff then proceeded to the office of Davenport & Fairhurst, some eight miles away, at Greenfield, Massachusetts, where the final papers were to be drawn and executed.

This was the office of counsel for the defendant. No information was forthcoming at the office of Davenport & Fairhurst.

During all of the time between twelve o'clock noon and a quarter of six in the afternoon the plaintiff was constantly in attendance upon the office of Davenport & Fairhurst, in good faith, and little suspecting that anything other than good faith was being practiced by the defendant. The plaintiff offered to leave his papers after execution, with the attorneys of the defendant. This offer was rejected. (Record Pages 190-191.)

A communication from the defendant had indicated that the defendant would accept a check for a much larger amount of money (about fifteen thousand dollars) if the plaintiff would make payment, in lieu of note for the pickle stock. (Record Page 28).

Not until seven o'clock, nearly three hours after all banks had closed in Greenfield, Massachusetts, and the bank at South Deerfield, also, had closed, did the defendant intimate that he would not accept a cashier's check on the South Deerfield National Bank or a check of the plaintiff in payment of the sum of twenty-five hundred dollars due under the contract.

The Court will doubtless take judicial notice of the fact that comparatively few obligations are met by legal tender. Practically all the business of the country is conducted upon a credit basis by means of checks and drafts. Plaintiff was ready, able and willing to perform all his obligations under the contract, and offered to do so within the time limited by the contract and in accordance with the universal method of performance in commercial dealings, and particularly in accordance with the custom prevailing between the parties heretofore. This was all that any person could reasonably expect under the circumstances.

Forfeiture has been defined as follows by the Court:

"A forfeiture is where a person loses some right, property, privilege or benefit in consequence of having done or omitted to do a certain act."

Vol. 2 Words & Phrases, 611, 2nd Ed.

"Forfeiture usually signifies loss of property by way of compensation for injury to the person to whom the property is forfeited, as well as punishment."

Idem.

"Forfeiture is a penalty for doing or omitting to do a certain required act."

Idem.

It is evident that if under the circumstances of this case, the defendant is deemed justified in refusing to go through with his legal contract, the plaintiff will suffer a forfeiture of \$500 paid on September 13th, 1923, and a forfeiture of the value of the salt and cost of delivery used in preserving the pickles at South Deerfield, Massachusetts.

It is elementary that forfeitures are not favored and that they will not be enforced where they will work an injustice.

"Forfeiture will not be enforced when the party for whose benefit it was inserted had waived the provision or is estopped to insist upon its enforcement, or performance has been prevented by some intervening circumstances sufficient to relieve the party from the performance of any other provision of the contract."

Pratt vs. Daniels-Jones Co., 133, Pac. R. 700,

Supreme Court of Montana.

"A party will be relieved from forfeiture if his breach of duty was not grossly negligent, wilful or fraudulent."

Cook Reynolds Co. vs. Thipman, 47 Mont., 298.

No forfeiture should therefore be permitted when the "breach of duty was not grossly negligent, wilful, or fraudulent."

Plaintiff does not concede that he was guilty of any breach of duty, but even though he were, it was not grossly negligent, wilful or fraudulent.

The offered performance by the plaintiff was made in good faith and was designed to secure to the defendant all benefits reserved to him by the contract and would have done so if accepted. Such refusal on the part of the defendant evidently was made not in good faith, but to avoid the contract. If the defendant merely desired what was coming to him he could not consistently have rejected the offers of payment made. By reason of the advance prices of pickles between the date of the contract and the time limited for its consummation, their value on October 1st, 1923, was approximately \$23,000, more than the contract price, making a very strong inducement to make an excuse, no matter how slight, for repudiation of the agreement.

Furthermore, such suspicion is emphasized by the fact that not one word was said by the defendant either by himself or through the defendant's counsel, about "money" until after the banks were closed October 1st, 1923, and the defendant knew that it was then impossible to secure it.

The plaintiff arrived at the office of the defendant's counsel on October 1st, 1923, about noon, and there was all that time until three o'clock in the afternoon when the plaintiff could have procured "money" but in further-

ance of his design, the defendant absented himself and came to the office of his counsel two and three-quarters hours after he knew the banks had closed.

During the afternoon of said October 1st, 1923, the plaintiff and his associates polished the stairs and floors of the offices of counsel for the defendant by walking in and out, patiently awaiting defendant's arrival.

In this case, however, the defendant waited until he knew it was physically impossible for the plaintiff to produce "money", and then made demand, not because he wanted it, but because he perceived a chance to use that pretext as a means of escaping his obligation to deliver the property in question.

Where a party designedly absents himself from home, for the fraudulent purpose of avoiding a tender, he cannot object that no tender was made.

Southworth vs. Smith, 61 Mass. 7 Cushing 391

"But even if the tenant had not purposely avoided and had been absent from home from necessity or other causes, with no intention to evade a tender, and in consequence of such absence, the demandant, by the use of due diligence, was unable to find the tenant, or any person authorized to act in his behalf and was thereby prevented from making the tender seasonably, no forfeiture of the estate would be incurred. The demandant has shown a readiness and due effort on his part to perform the legal duty required of him, and a failure to accomplish it through no fault on his part, but because the act of the tenant had put it out of his power."

Southworth vs. Smith, 61 Mass. 7 Cushing 393

Borden vs. Borden, 5 Mass. 67

Evasion of one party on delivery of deed

Gilmore vs. Holt, 4 Pick., 257, 264

Designedly evaded a tender where money was due

Tasker vs. Bartlett, 5 Cush., 359

Absence from Commonwealth excused obligee from further performance when advised by wife of obligor that he was absent.

An agreement to procure a good warranty deed on a certain day is satisfied if the grantor is then ready to tender the deed, and is prevented from doing so by the fraudulent evasion of the grantee.

Borden vs. Borden, 5 Mass., 67

Tasker vs. Bartlett, 59 Mass., (5 Cushing) 363

Southworth vs. Smith, 61 Mass., (7 Cushing) 391

Hayes vs. Turner, 49 Mass., (8 Metcalf) 555

For the effect of readiness and willingness to perform without actual tender see

Linton vs. Allen, 154 Mass., 432.

Attempted payment by mortgagee is held equivalent to tender in

Schayer vs. Com. Land Co., 163 Mass., 322

Where one has offered to make payment by a medium which is recognized as a customary and usual method of payment, the contract itself not requiring payment by any particular kind of money or currency, and by natural inference, both from the contract, from the former payment thereunder, and from correspondence between the parties, it is fair to presume that a check will be acceptable, and where a person goes to the trouble to secure a cashier's check or certificate of deposit on a bank with which the other party was well acquainted as to its financial stability and such offer has been refused

by the promisee, then he has made such substantial performance as will sustain an action upon the contract.

"It has been frequently held that acts in sufficient in themselves to make a complete tender may operate as a proof of readiness to perform, so as to protect the rights of a party under a contract where proper tender is made impossible by reason of circumstances not due to fault of tenderer.

Schaeffer vs. Coldren, 88 Atlantic, 98.

Hault vs. Finger, 71 Atlantic, 843.

See 844, 2nd ed.

29 American and English Encyclopedia
of Law, 2nd Ed., 697.

"In the absence of any provision in the contract, or of any circumstances excluding it, contracts for the payment of money refer to the ordinary and usual currency in which business is transacted."

30 C. v. 1210, Fabbey vs. Kallbfleisch.

62 N. Y., 28.

By fair inference, in construing the contract in this case, the plaintiff might very reasonably have concluded, as he obviously did believe, that the defendant expected a payment of the twenty-two hundred dollars by his check.

Assuming that the defendant would be entitled, if demanded, to be paid in legal tender, we contend that the inference reasonably to be drawn from the contract and from the customs of the country necessitated that the defendant give notice in some manner to the plaintiff that he would require payment in legal tender money.

It was provided in the contract that "tender of

performance shall be sufficient on the part of the party of the second part if on said day (October 1st, 1923) the sum of twenty-five hundred dollars, plus suitable notes and mortgages are left with said Davenport & Fairhurst for delivery to the party of the first part.

When the party of the second part (the plaintiff) signed the contract, he in effect said "I will be on hand not later than October 1st, 1923, at the office of your lawyer to receive proper transfers of the property and to deliver the necessary papers on my part, and to pay you twenty-five hundred dollars by the usual medium of exchange," and in compliance therewith he was at the place necessary, promptly, on time, ready to receive his papers and to pay for them as promised.

The fact that the defendant accepted a check upon the bank of the plaintiff at East Hartford, Connecticut, located in a different State sustained such an interpretation.

"Where the parties to a contract or a deed have done any acts or made any settlement under it, those acts are facts admissible in evidence to show the contemporaneous construction put upon the instrument by the parties."

Lovejoy vs. Lovett, 124 Mass., 270

The plaintiff acted in accordance with the usual business custom and usage, and having tendered such performance, he substantially at least performed his obligations under the contract, and is entitled to sustain his action thereon for damages.

The plaintiff tendered his payment within the time and in the manner contemplated by the contract.

Payment by legal tender would be an unusual method of payment, and a method for which the plaintiff could not be expected to be prepared.

It would be little short of ridiculous for the plaintiff to bring from his home in East Hartford, Connecticut, to South Deerfield, Massachusetts, twenty-five hundred dollars in legal currency on his person for the purpose of paying this amount under his contract to the defendant. Particularly is this so when we find that some two weeks before, by the terms of the contract itself, he had paid by check the sum of five hundred dollars, and had been requested by the defendant to make payment "by check" of nearly fifteen thousand dollars on the very day when, as it turned out, the defendant declined the obligation of a National Bank for twenty-five hundred dollars. There can be but one conclusion. The defendant's action was the trick of a man determined to avoid his just obligations.

In characterizing the conduct of the defendant, the Court below said:

"It is perfectly obvious that he (the defendant) was trying to get out from under his contract." (Record page 64), and

"Your man (the defendant) was pretty careful to keep away until the banks were closed." (Record page 70.)

Again, after a statement made by counsel that the Certificate of Deposit was as good as cash, the Court said:

"It happened to be. There were no grounds to think it wasn't. I agree that his (the defendant's) attitude was entirely unreasonable and taken by a man who wanted to escape his honest obligations." (Record page 71.)

When the plaintiff journeyed to Greenfield, prepared to make payment by valid check or certificate of deposit, accompanied by the ones whose signatures he had agreed to provide as joint makers of the fifteen thousand dollar

note, and with all the other papers duly prepared and executed, he certainly had done all that could be expected of him under the usual methods of business transactions.

The failure of the parties to carry into consummation the transactions provided for in the contract was due to the act of the defendant in asking and demanding of the plaintiff that he do something which had not been anticipated by the plaintiff, and which, under the usual methods of transacting business, could not be anticipated, and at the time of asking could not be done.

Although time is made of the essence of the contract,

"If the party prevents performance by the other, he cannot insist on the stipulation."

13th Corpus Juris, 689.

Courts are constituted to insure honest and fair dealing between men and to punish fraud and deceit. If defendant is permitted to escape his obligations under this contract in the manner in which he has attempted to do, then the result is punishment for him who has, in good faith, attempted to fulfill his agreement, and reward for him who, by fraud and trickery, seeks to avoid his obligations.

The trial court was in error in deciding that the law of Massachusetts required the signature of the plaintiff's wife upon the mortgage tendered by the plaintiff as part performance under the contract.

"A conveys land to his four sons in fee, who, by deed of the same date, mortgage the same land to the father, to secure the payment of a sum of money, and also a maintenance for the father during his life; it was held that the two deeds were parts of the same contract, and that the

seisin of the sons was not sufficient to entitle the widow of one of them to her dower in the land."

Syllabus in *Holbrook vs. Finney*, 4 Mass., 566.

"Evidence that the grantee in a deed reconveyed the granted premises to his grantor by a deed of mortgage dated and acknowledged on the same day when the deed to him was acknowledged, and recorded on the same day when the deed to him was recorded, is sufficient to authorize a finding that his seisin was only monetary, although the deed to him was dated several days before it was acknowledged.

Syllabus in *Pendleton, et ux vs. Pomeroy, et al.*, 4 Allen, 510.

See also

Libbey vs. Tidden, 192 Mass., 175-184.

1. We believe that the decision in this case is in conflict with the decision of the case of *Servil vs. Jamieson* decided in the Ninth Circuit. This conclusion is supported by the dissenting opinion of Mr. Justice Anderson who says, "The case for the plaintiff is at least as strong as in *Servil vs. Jamieson*, 255 Fed. 892, where the Court of Appeals for the Ninth Circuit reversed the ruling of the District Court like the one made by the Court below in this case, holding the case was for the jury."

2. We believe that the decision in this case should be reversed because it has decided an important question of general law in a way probably untenable as applied to modern business practices. In the words of Mr. Justice Anderson dissenting, "I find no case which on fair analysis of the facts go so far in support of an inappropriate and unnecessarily technical rule as does the decision of the majority in this case. This decision extends a rule that

should be narrowed. What the business community understands the word 'payment' to mean should so far as possible be its meaning in law. At any rate, attempts to escape performance of contract obligations by invoking technicalities of this sort call for a liberal interpretation of the doctrine of estoppel and the submission of all questions of fact to the conscience and intelligence of the jury."

3. We believe that the decision in this case should be reversed because, in the words of the dissenting opinion, "The decision commits this court to a rule of law entirely inconsistent with modern business practices and which will inevitably operate to promote trickery and unfair dealing. It tends to destroy the obligation of contracts, the enforcement of which is one of the main duties of courts of justice. Law, as a right-enforcer, ought not to be allowed to drag unnecessarily behind the established, honest practices of the business community." After careful consideration of the record, Mr. Justice Anderson reached the conclusion that "in this case the result reached is grossly unjust to the plaintiff."

4. We believe that the decision in this case should be reversed because the Circuit Court of Appeals erred in construing the provision of the contract which required that \$2500, in view of the preceding relations, customs and precedents between the parties, meant, so far as the transaction in question was concerned, legal tender money when examination of the record will disclose that the defendant not only had accepted the plaintiff's check for a substantial amount theretofore but had by letter requested the payment by check of \$15,000, a sum six times as great as the amount for which the defendant afterwards demanded legal tender in payment thereof. Not only in accordance with the practice that had been previously established between

the parties but in exact accordance with the established practices in the overwhelming majority of commercial transactions involving any substantial amount, the plaintiff in good faith tendered to the defendant not alone his own check but actually made physical tender of a certificate of deposit on a national bank of conceded soundness.

5 We believe the decision in this case should be reversed because the defendant, by his actions and his letter asking for a check from the plaintiff for a much greater amount, estopped himself from demanding legal tender in the amount of \$2500. In the words of the dissenting opinion, "The gist is that the defendant left the plaintiff without the slightest reason to expect that payment by the usual method in all substantial business transactions would not be accepted.

Ct. Shutte vs. Thompson, 15 Wall. 151, 159, 160;

Wright vs. Davidson, 181 U. S. 371, 377;

Mutual Life Insurance Co. v. Hill, 193 U. S. 551, 560,

Baker v. Humphrey, 101 U. S. 495.

6 We believe that the decision in this case should be reversed because there was substantial evidence in this case for the jury of waiver or estoppel. In the words of the dissenting opinion, "In my opinion there was abundant evidence in this case for the jury of such waiver or estoppel. The defendant's motive to escape from his contract was obvious, for, because of a frost, the stock of pickles he was selling were then worth substantially more than the contract price. He did not reach the place agreed upon for completing the trade until after the close of ordinary business hours. This was a most significant fact. It was at least six or seven o'clock in the evening before the papers were ready to be passed. Then, for the first time, the defendant refused to accept

the plaintiff's check, — demanded cash, and, failing to get it, left the office."

7. And finally we believe the decision in this case should be reversed because a court of justice is placed in a position where it is made to appear to lend itself to the promotion of trickery and fraud. In the words of Mr. Justice Anderson dissenting, "There were other facts and circumstances tending to show that the defendant sought, and found (as is now in effect held), a chance to trick the plaintiff out of rights arising under any fair and honest code of business ethics."

Respectfully submitted,

PERCY S. BRYANT,
WILLIAM J. MALONE,
MORRIS S. FALK.

Counsel.

Office Supreme Court, U.
F I L E D

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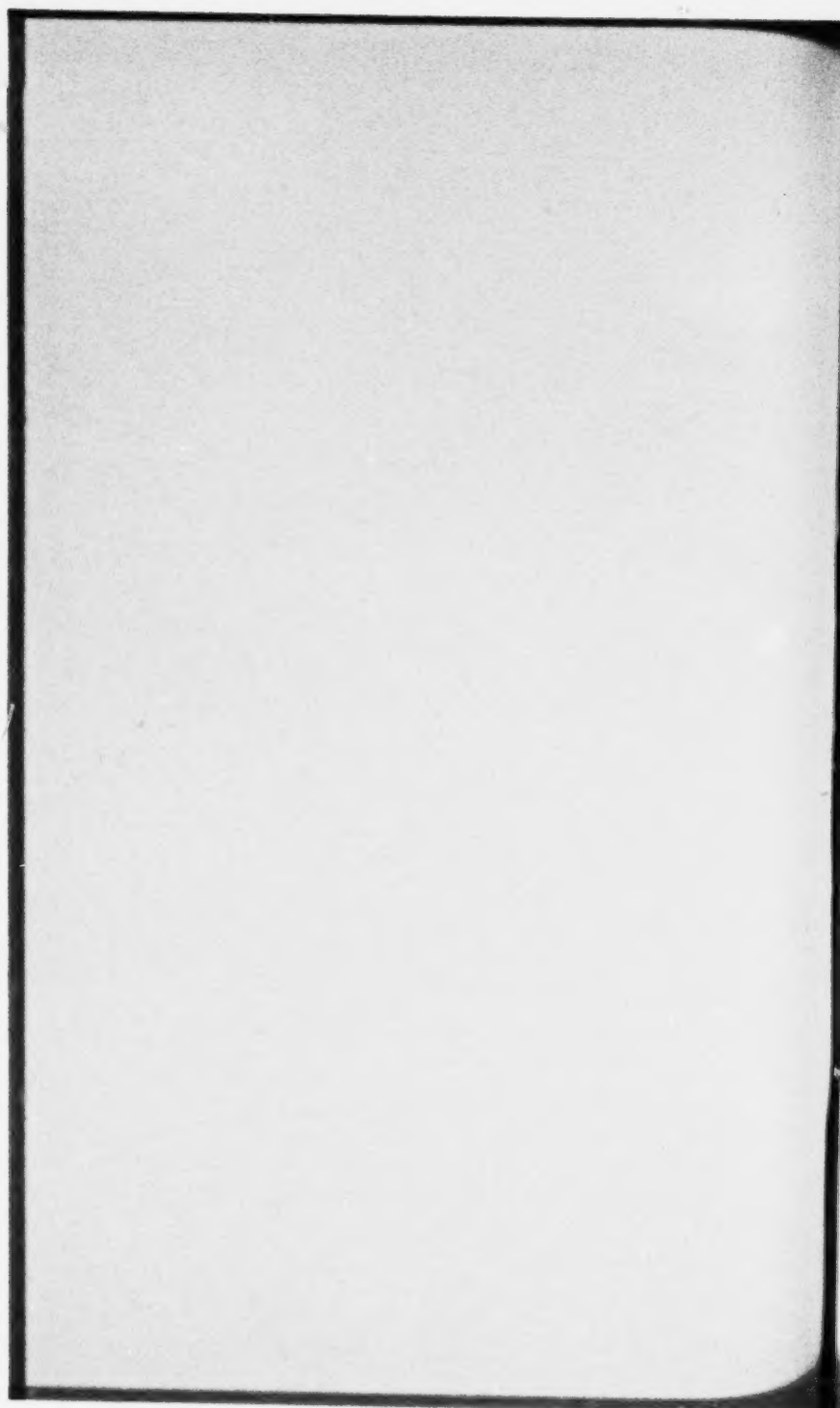
In the
Supreme Court
of the
United States

October Term, 1927

No. 65
RAY C. SIMMONS,
Petitioner,
v.
EDWARD P. SWAN,
Respondent.

BRIEF FOR THE RESPONDENT

William A. Davenport,
Charles Fairhurst,
Counsel for Respondent.



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In the
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October Term—1927

No. 65

RAY C. SIMMONS

Petitioner

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EDWARD P. SWAN

Respondent

BRIEF FOR RESPONDENT

STATEMENT OF FACTS.

This is an action of contract to recover the damage which the petitioner claims he suffered by reason of an alleged breach of a written contract entered into between the parties on September 13, 1923. (R. Pg. 4 and 5)

The case was tried before Mr. Justice Brewster and a jury in the District Court of the United States for the District of Massachusetts and a verdict for Swan was directed by order of the court.

Upon writ of error to the Circuit Court of Appeals for the First Circuit, the judgment was affirmed by a majority of the Court. (R. Pg. 197 to 201.)

The case comes here on a writ of certiorari to review that decision and judgment.

The evidence showed that after some preliminary negotiations, the parties called at the office of Davenport & Fairhurst, Attorneys, of Greenfield, Massachusetts, and there on September 13, 1923, the contract (Exhibit "A") (R. Pg. 5) was drawn up and executed.

In substance this contract provided for the sale by Swan to Simmons of certain real estate in South Deerfield, Massachusetts, all tank pickles on the premises and the pickle business theretofore conducted by Swan.

Payment for the real estate and pickle business (not including the tank pickles) was to be made as follows:

\$500.00 Five Hundred Dollars—Deposit on execution of agreement.

2500.00 Twenty-five Hundred Dollars—on or before October 1, 1923.

12000.00 Twelve Thousand Dollars—demand note of Simmons bearing interest at 6% payable semi-annually.

\$15000.00 *Total*

This demand note was to be secured by suitable mortgages in standard form covering the property conveyed.

Payment for the tank pickles was to be made at the rate of \$4.00 per thousand according to the receipt book (Cucumbers Received) of Swan, by demand note of Simmons, F. C. Gould, and T. J. Molunphy as joint makers.

The time set for the performance of the agreement was on or before October 1, 1923, and the place the office of Davenport & Fairhurst, Attorneys, Greenfield, Massachusetts.

The agreement further provided that:

"Tender of performance on the part of the Party of the First Part shall be sufficient if on said date a deed and bill of sale, in accordance with the provisions hereof, is left with said Davenport & Fairhurst for delivery to the Party of the Second Part; and tender of performance shall be sufficient on the part of the Party of the Second Part if on said date the sum of Twenty-five Hundred Dollars (\$2,500.00) plus suitable notes and mortgages, are left with

said Davenport & Fairhurst for delivery to the Party of the First Part."

It was expressly stipulated that "time is of the essence of this contract."

On September 22, 1923, Swan wrote Simmons:

"You spoke about giving me a check in full for *pickle stock* and trust you will do so as it would be more convenient for me." (R. Pg. 28.)

In reply he received the following letter written by F. C. Gould of the Silver Lane Pickle Company, with which Simmons was connected:

"Replying to your kind favor of recent date. We expect to be at your place Monday, October 1st, but not early in the morning. It is Election Day here and we want to vote before leaving. We can make arrangements to pay a large proportion of cash providing you can make it an object for us to do so. Presume we can arrange that part satisfactorily." (R. Pg. 54.)

Monday, October 1st, was the last day set for the performance of the contract.

Swan, gathering from the letter that Simmons was not coming in the morning and having affairs in Springfield, went there with his wife (R. Pg. 149) and thence to Westfield, thence home to South Deerfield and straightway to Greenfield.

Around twelve o'clock Simmons and Gould arrived at Greenfield at the office of Davenport & Fairhurst (R. Pg. 29.)

About two o'clock Swan called Mr. Fairhurst from Westfield to inquire if the parties were there and to tell him that he was on his way to Greenfield and would probably be there by three o'clock. (R. Pgs. 30, and 164.)

This information was communicated to Simmons and Gould.

Around two o'clock Simmons and Gould consulted F. J. Lawler, Esq., a practising attorney in Greenfield for thirty years, and went over with him the matter of the contract. (R. Pgs. 47 & 66.)

Soon after three o'clock, Simmons, Gould, and Attorney Lawler, arrived at the office of Davenport & Fairhurst. (R. Pg. 48.)

Molumphy, whose signature was needed to the pickle note, did not leave Connecticut until about one o'clock and traveling by automobile, reached Greenfield at the office of Davenport & Fairhurst about three o'clock or a little after (R. Pg. 61) but his associates were already there. (R. Pg. 58.)

The banks in South Deerfield and Greenfield close at three o'clock. (R. Pgs. 57, 63 and 64.)

The evidence was conflicting as to the time that Swan arrived in Greenfield, varying from 4:15 p. m. (R. Pg. 150), or 4:30 p. m. (R. Pg. 183), 5:45 (R. Pg. 64) to between 5:00 and 6:00 p. m. (R. Pg. 31.)

The pickle note was then figured and the papers were signed.

A discussion then took place relative to Swan's engaging in a competing business and after some discussion it was finally agreed to insert in the bill of sale an agreement that he should not compete for a period of fifteen (15) years. (R. Pg. 183.) Further discussion then ensued relative to the demand note (R. Pgs. 150, 184 and 185) and Simmons, his associates and lawyer withdrew to another room and had a long conference, finally returning and announcing that they were going through with the deal. (R. Pgs. 170 and 184 and 185.)

Gould thereupon tendered to Swan what appeared to be a check (but which was in fact a certificate of deposit of the Produce National Bank of South Deerfield) in the sum of \$2,500.00. (R. Pgs. 151 and 185.)

Swan refused the check insisting on money or cash. (R. Pgs. 35, 37, 66, 67, and 168.)

None of the parties had "money" and tender was then

made by each party to the other of the necessary papers, excepting that in place of "money" the check was tendered and refused. (R. Pg. 185.)

The certificate of deposit was payable to F. C. Gould but was not endorsed. (R. Pgs. 54, 55, 185.)

LAW AND ARGUMENT

The declaration in the case at bar alleges the execution of the contract in question and then states:

"At the time specified in said contract, the plaintiff was ready, able and willing to perform all the acts and things required of him to be done and performed by the terms of said contract, and offered to the defendant so to do, and demanded of the defendant that he perform and do the things required of him by the terms of said contract." (R. Pg. 4.)

This was the claim which the defendant was called upon to meet, namely, that the plaintiff was

"ready, able and willing to perform his contract and offered so to do."

Yet the evidence showed beyond any question of doubt that the plaintiff was not ready, able and willing to so perform.

In fact, the record (Pg. 11) shows that the plaintiff now claims recovery because he was "obstructed and prevented" by the defendant from making such tender of performance as was required of him.

No contention was made by the plaintiff that "legal tender" had been offered.

The Court: "The plaintiffs do not contend, do they, that this is legal tender?"

Mr. Bryant: "Oh, no."

The Court: "There is no question about that." (R. Pg. 69.)

Even assuming for purposes of argument that the defendant did obstruct or prevent a proper tender by the plaintiff, yet this would not avail the plaintiff.

Having sued upon a special contract, and averred actual performance on his part, he must prove such performance and cannot have a recovery upon the ground that the defendant has waived any of these requirements by conduct or otherwise.

Putnam-Hooker Co. vs. Hewins, 204 Mass. 426 *at* 430.

It is well established that upon an averment of performance the plaintiff cannot recover by proof of a waiver.

Allen vs. Burns, 201 Mass. 74 *at* 76.

If the plaintiff is to rely upon a waiver by the defendant, it should be pleaded and proved as an excuse for non-performance.

Freeland vs. Ritz, 154 Mass. 257 *at* 262.

As was said in

Colt vs. Miller, 10 Cush. 49 *at* 51.

"It is a cardinal rule of evidence that allegations essential to the plaintiff's claim must be proved. In the declaration in this case, it was essential, in order to show the plaintiff's claim, that he should allege that he furnished or was ready to furnish the defendant with the materials on which he was to work, and in season for him to complete the work on them within the stipulated time; or else, that he should allege a sufficient excuse for not so furnishing them. The plaintiff has adopted the former course and has alleged his

performance of what the agreement required of him; and to prove this allegation he relies on evidence of matter which excused him from such performance, to wit: a waiver thereof by the defendant. But a waiver, by one party to an agreement, of the performance of a stipulation in his favor, is not a performance of that stipulation by the other party. It is an excuse for non-performance and, as above stated, should be so pleaded."

See generally: *Palmer vs. Sawyer*, 114 Mass. 1 @ 13.
Pomeroy vs. Gold, 2 Met. 500 @ 502.
Gilbert Co. vs. Butler, 146 Mass. 82.
Palmer vs. Stockwell, 9 Gray, 237.
Bradstreet vs. Baldwin, 11 Mass. 228
and see Note @ 233.

The contract specifically called for a "tender of performance" and the plaintiff knew or ought to have known what was demanded of him in order to put the defendant in default. (R. Pgs. 5, and 6.)

Such tender of performance was to be sufficient on the part of the plaintiff if there should be left with Davenport & Fairhurst for delivery to the defendant:

(1) The sum of Twenty-Five Hundred Dollars (\$2,500.00).

(2) Plus suitable notes and mortgages.

Why the performance of the contract was postponed until the last day is beyond us.

Certainly there was no evidence that Swan was responsible for such delay.

The contract was executed September 13, giving eighteen (18) days within which to allow the plaintiff to raise the sum of \$2,500.00 and sign the papers. Yet the plaintiff waited until the very last day to perform and this though the contract specifically stated that "time is of the essence of this contract."

Time being of the essence, tender must be made within it.

Smith & Rice Co. vs. Canady, 213 Mass. 122.

Although at law, time is always of the essence.

Preferred Underwriters vs. N. Y. N. H. Railroad,
243 Mass. 457 at 463.

Chatalian vs. DiFusco, 244 Mass. 513.

A letter was written to Swan that

"We expect to be at your place Monday, October 1st, but not early in the morning. It is Election Day here and we want to vote before leaving." (R. Pg. 54.)

The plaintiff in company with Gould reached Greenfield around noon. They saw their lawyer about two o'clock and had him search the title to the property and went over the agreement with him. (R. Pg. 65.)

Molumphy, whose signature was needed to the pickle note for \$14,000.00 and some odd dollars, did not leave Connecticut until about one o'clock and travelling by automobile, reached Greenfield about three o'clock, or a little after. (R. Pg. 61.)

The exact time he reached the office is uncertain, but when he arrived there his associates and lawyer were there at the office and they testified that they did not arrive there until soon after three o'clock. (R. Pgs. 48-58.)

In other words, before the plaintiff could have made any kind of tender or be able, ready and willing to perform, he needed Molumphy, who did not appear in Greenfield until after three o'clock and the banks were then closed.

Yet they attempt to charge the delay to Swan. Their letter was to the effect that they were not coming early in the morning and their party was not complete and ready to do business until after three P. M.

Can they then complain that Swan reached there but an hour or two later? Swan says it was 4:15 (R. Pg. 150) and it certainly must have been before five o'clock for the

stenographers were still on duty at the office and they leave daily at five P. M. (R. Pg. 183.)

There was a long delay and discussion at the office caused, not by Swan, but by the plaintiff and his associates. (R. Pgs. 150, 170, 183, 184, 185.)

Then it was that the "check" or "certificate of deposit" for \$2,500.00 was tendered in performance of the contract and refused, and demand made for "money or cash." (R. Pgs. 35, 37, 66, 67 and 168.)

We respectfully submit that Swan was well within his legal rights in refusing to accept a certificate of deposit in place of legal tender.

The contract was to pay so many "dollars" and this, according to the universal understanding and holdings in the courts of Massachusetts and of the United States, means "lawful money of the United States," that is to say, money which by the Acts of Congress constitutes legal tender.

Vick vs. Howard, 136 Va. 101 *et* 108.

In the case of

Pearlstein vs. Novitch, 239 Mass. 228,
the contract in question expressly recited that the purchase price was "Twelve Thousand Five Hundred Dollars (\$12,500.00.)"

The court said on Page 231 that

"such recital is to be construed as an agreement to pay the amount in cash"

and the plaintiff, not having paid or tendered to the defendant \$12,500.00 the purchase price in cash, could not recover.

See: Beach & Clarridge Co. vs. American Steam Gauge Co., 202 Mass. 177.

Ryan vs. Hall, 13 Met. 520.

Dixon vs. Williamson, 173 Mass. 50.

Vick vs. Howard, *Supra*.

Legal tender means tender of gold, silver, or such currency as the Federal Congress has prescribed.

Hallowell Bank vs. Howard, 13 Mass. 234.
Sargent vs. Southgate, 5 Pick. 311 @ 319.
Julliard vs. Greenman, 110 U. S. 204 @ 215.
Morrill vs. Brown, 15 Pick. 173 @ 175.

Bank notes are not legal tender if objection is made on that account.

Snow vs. Perry, 9 Pick. 339 @ 341.
Phillips vs. Blake, 1 Met. 156 @ 158.
Ward vs. Smith, 7 Wallace (U. S.) 447.

A cashier's check is not legal tender and need not be accepted.

Beach & Clarridge Co. vs. American Steam Gauge Co.,
Supra.

Nor, in fact, is any check or certificate of deposit.

Servel vs. Jamieson, 255 Fed. Rep. 892.

This being true, in the absence of a waiver, express or implied, the defendant's right to demand legal tender was perfectly clear.

Vick vs. Howard, 136 Va. 101 @ 108, and cases therein cited.

No such tender was ever made by the plaintiff nor was he ready and able to make such a tender when Molumphy reached the office of Davenport & Fairhurst after the close of the banks on October 1st, 1923.

It cannot, therefore, be said that in the words of the declaration in the case at bar

"the plaintiff was ready, able and willing to perform all acts and things required of him to be done and performed by the terms of said contract, and offered to the defendant so to do."

Certainly it was necessary for the plaintiff to prove that he tendered performance on his part.

Harvey vs. Bross, 216 Mass. 57 @ 60.

Or at best, before he could put the other party in default for non-performance, he must show a readiness and ability on his own part to perform.

Hapgood vs. Shaw, 105 Mass. 276.
Carpenter vs. Holcomb, 105 Mass. 280.
Howland vs. Leach, 11 Pick. 155.
West vs. Platt, 127 Mass. 367.

As was said in

Linton vs. Allen, 154 Mass. 432 @ 439.

"the plaintiff must show that he was ready, willing, and able to do his part, and the defendant had notice thereof, and that nothing short of this would put the defendant in legal default."

And in

Breed vs. Hurd, 6 Pick. 356.

it was said that to make a proper tender

"the party must have the money about him wherewith to make the tender."

The plaintiff says that he was able, ready and willing to perform, but

- (1) He did not have legal tender as called for by his contract.
- (2) He did not draw, sign or tender his demand note for \$12,000.00.
- (3) He did not draw, execute or tender his real estate mortgage.
- (4) He did not draw, execute or tender his personal property mortgage.

- (5) He came to Greenfield evidently expecting that all papers were to be drawn by Swan's attorney because the original contract was so drawn and in order to save himself expense.
- (6) Neither he nor his attorneys at any time before Swan arrived drew, executed or offered any of these papers.
- (7) And further, the plaintiff refused to take a bill of sale in accordance with his contract unless and until Swan had stipulated that he would not engage in a competing business for a period of fifteen (15) years. And this matter was discussed at great length. (R. Pg. 183.)

Yet the plaintiff says that he was able, ready and willing to do business in accordance with his contract and charges the breach to the defendant.

It would be a waste of time to dwell further on this aspect of the case for it must be perfectly clear that the plaintiff at no time was "ready, willing and able to perform and offered so to do."

The only thing left for the plaintiff is to argue, as we presume he will, that he was "obstructed or prevented" from so performing by the defendant, and hence the presentation of legal tender was waived, or at least the defendant is estopped to take advantage of the improper tender.

Surely the plaintiff cannot argue that the acceptance of the initial check for \$500.00 on the signing of the contract bound the defendant to accept a check at the final performance thereof, or waived his right to demand that the final payment be made in currency.

In law, logic and reason, that could not be so.

Servel vs. Jamieson, Supra.

Vick vs. Howard, Supra at 110.

Even the acceptance of a number of previous checks or payments in current funds would not have constituted a waiver as to any unpaid balance.

Servel vs. Jamieson, Supra.
Vick vs. Howard, Supra.

In this case the initial deposit was \$500.00 while the total contract price was approximately \$30,000.00.

And it should be observed that in the case at bar there was no evidence that the parties to this contract had ever had any personal business dealings before.

The plaintiff attempted to introduce evidence of business dealings had between the defendant and the Silver Lane Pickle Company but such evidence was excluded as res inter alios, and as no proof of custom or course of conduct between the parties to this suit. (R. Pgs. 14, 104, 105.)

It may be true that by common consent debts are usually paid in any funds which ordinarily pass as money; but no such custom, even if proved, would entitle the plaintiff, over the protest of the defendant, to make payment in such manner.

Vick vs. Howard, Supra, *at* 110.

As previously stated, the plaintiff has failed to prove his case as laid and under the authorities quoted, the question of "obstruction or prevention" has no pertinency to the case.

But even assuming that it had a legitimate place in this case, yet we submit there was no proof of any "obstruction or prevention" by the defendant which disabled the plaintiff from performing or offering to perform his contract.

We don't question that it is well settled law that

"he who *prevents* a thing being done, shall not avail himself of the non-performance he has occasioned."

Fleming vs. Gilbert, 3 Johnson (N. Y.), 520 *at* 523.

Or that he cannot insist upon a condition, the non-performance of which has been *caused* by himself.

Tighe vs. Maryland Casualty Co., 218 Mass. 468.

There are many cases where tender has been excused where the person to whom the tender was to be made absented himself so as to avoid the tender.

Borden vs. Borden, 3 Mass. 67.

Gilmore vs. Holt, 4 Pick. 258 *at* 264.

Southworth vs. Smith, 7 Cush. 391.

Or was absent from the Commonwealth so that a tender could not be made.

Tasker vs. Bartlett, 3 Cush. 359.

Or "dishonestly and arbitrarily" or "wilfully and fraudulently" or "capriciously" prevented performance.

Hebert vs. Dewey, 191 Mass. 403 *at* 411.

In such cases it has uniformly been held that a tender is a mere idle ceremony and proof of willingness and *readiness* to perform is the equivalent of a tender and sufficient.

But always, without exception, the courts have said that the plaintiff must have been

"able, willing and ready to perform."

As was said many years ago, by Parker, C. J., in

Frazier vs. Cushman, 12 Mass. 277:

"In all those cases, the party intending to perform the contract on his part, proved that he was *actually ready* and had offered to perform; and that the other party had evaded or refused to receive the money offered, or other thing to be tendered, with a *declaration, or acts* amounting to it, that he did not intend to perform the contract on his part. In such cases it has been wisely determined, that, as an actual tender would be idle and useless, if not impossible, the readiness and offer shall be a legal

substitute. He who prevents the performance of a contract shall not take advantage of its non-performance."

And in the same case, the court said:

"This conduct may have been artful and disingenuous on the part of the defendant, designed to put the plaintiff off his guard and to deprive him of the benefit of his contract, but we cannot give more effect, in a legal point of view, to the acts of the parties, because one of them had more understanding and artifice than the other. A court of equity might possibly afford relief; but we can only administer the law."

But *when one party to the contract, such as Swan in the case at bar, actually tenders performance of the things required of him, it is absolutely essential that the other party to the contract likewise tenders performance.*

Mere readiness and willingness to perform is then not enough.

He must offer to do and perform those things required of him by his contract.

A tender imports not only readiness and ability to perform, but actual production of the thing to be delivered. The formal requisite of a tender may be waived, but to establish a waiver there must be an *existing capacity* to perform.

Leask vs. Dew, 92 N. Y. Supp. 891.

Banc vs. Railroad, 171 N. C. 328.

The plaintiff never had "legal tender" and in that respect was never "ready and able" to perform.

The plaintiff claims that it was for the jury to determine whether there was any "obstruction or prevention" of performance.

But what evidence was there for the jury on this question?

The court in granting the motion for a directed verdict said

"I have been considering what I would say to the jury, and I don't see how possibly I could say anything except to say that there was no evidence to show that the tender was obstructed or prevented by the delays of the defendant." (R. Pg. 193.)

And we submit that the court was right. Surely the plaintiff cannot contend that it was the function of the jury to speculate, guess or conjecture as to whether Swan obstructed or prevented performance. There was not a scintilla of evidence in this respect.

Merely the fact appeared that Swan arrived in Greerfield somewhere between 4:15 and 5:45 P. M. and Molumphy did not appear until after three P. M.

There was no act of Swan that prevented or obstructed the plaintiff from getting some time during the day \$2,500.00 in legal currency.

The plaintiff consulted his lawyer shortly after noon and was with him until seven P. M. or so.

He was to blame for waiting until the last day set for performance.

He knew that "time was of the essence."

He knew or ought to have known that the certificate of deposit could be refused.

He was not ready to do business and make any kind of tender until Molumphy arrived after the banks had closed at three o'clock.

It is obvious that he took a chance.

How, then, without proof by any evidence, can he now say that Swan obstructed or prevented him from having in his possession \$2,500.00 in currency?

We respectfully submit that no case can be found where the jury was permitted to speculate or guess as to the con-

duct of the defendant in obstructing or preventing performance.

There must be some evidence of an *overt act of prevention, obstruction or hindrance* to constitute a waiver.

In the case of

Servel vs. Jamieson, 255 Fed. Rep. 892,

wherein are some of the aspects of the case at bar, the plaintiff's agent, Stitt, was *ready to perform* his contract at eight A. M. One of the defendants took him by automobile to a town named Glasgow where they arrived at one P. M. Then he told Stitt to go to Nashua and that he would find the other defendant there and they would all meet there for a settlement. Stitt went to Nashua by train, he understanding that the defendant was to come by automobile. He reached Nashua at two P. M. and searched for the defendant but he was not there. He thereupon secured an automobile and went back to Glasgow, arriving there at four P. M. and there met both of the defendants on the street and told them that he was ready to settle. A check was then offered and refused because not legal tender.

The plaintiff made an offer of proof that arrangements had been made with the bank to honor this check and notice was given to the defendants.

The court said:

"In view of these features of the evidence and the plaintiff's offer of proof, from which the jury might have found that, but for such delay, the currency might have been obtained to make payment on that day, we think it was error to direct the jury to return a verdict for the defendants."

In that case there was clear evidence of an *overt act* on the part of the defendants. The plaintiff was deliberately sent astray by one of the defendants.

In the case at bar, there was no *overt act* of prevention or obstruction of performance. Further, there was no evidence, nor offer of proof, as in the *Servel* case, that the plaintiff in the case at bar could have secured currency if Swan had appeared earlier in the day.

It was admitted that the banks closed at three P. M.

Molunphy did not appear to do business until after that hour.

Surely we cannot assume, in the absence of evidence, that the plaintiff could have cashed his certificate of deposit for \$2,500.00 after three P. M. in either South Deerfield or Greenfield.

The case of

Vick vs. Howard, 136 Vic. 101,

is authority for the principle that a demand for legal tender on the last day set for performance and late in the evening is not of itself enough to show "obstruction or prevention" of performance.

And in the case of

Beach & Clarridge Co. vs. American Steam Gauge Co., 202 Mass. 177,

the court held that the defendant was well within his rights in refusing to receive a cashier's check for \$5,000.00 instead of actual money, or to give the bidder time to procure the money thereon, even though this could be done in fifteen or twenty minutes.

We respectfully submit, therefore, that the court was right in its ruling.

During the course of the hearing it appeared that the purchase money mortgage to be given by the plaintiff covering the real estate to be bought, was not signed by the wife of the plaintiff.

Obviously, under Massachusetts decisions, such a mort-

gage did not need the wife's signature to release dower as the seisin was instantaneous.

The court, however, commented on the lack of her signature, but it clearly appears from the remarks of the court (R. Pg. 193) that this did not influence him in directing the verdict.

However, it is of no materiality because if the court was right on the issue in chief as to tender and obstruction, it becomes of no importance.

It has been suggested that there was a substantial performance, but obviously the doctrine of substantial performance is not applicable in the case at bar.

There is no such thing, at least known to us, as a "substantial tender." Either the tender is good or bad.

It may be that this court will feel, as the presiding Justice did, before the evidence and case was closed, and as appears by the record,

"that the attitude of the defendant was entirely unreasonable and taken by a man who wanted to escape his honest obligations."

Certain it is, though, that the defendant offered and insisted that his contract be literally carried out. *He was ready to do this* and demanded that the other party do likewise.

It must be remembered that for one or two hours that afternoon and evening, before any check or money was talked about or offered, there had been considerable wrangling and feeling.

Whether the defendant was morally right or wrong is, we apprehend, of no importance in this case, provided that the defendant personally did no *overt act* to obstruct performance by the plaintiff.

If damage came to the plaintiff, it resulted from his own delay, carelessness or negligence in not providing himself with proper legal tender, and in not exercising his rights

under the contract until the last part of the last day for exercising them.

Legally, the motive of the defendant is of no importance and damages can never be recovered where they result from a lawful and legal act of the defendant.

Randall vs. Hazelton et al., 12 Allen, 412 @ 415.

Boyd vs. Stone, 11 Mass. @ 341.

We respectfully submit, therefore, that there was no error in the trial of this case and that the judgment should be affirmed.

Respectfully submitted,

WILLIAM A. DAVENPORT

CHARLES FAIRHURST

Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 65.—OCTOBER TERM, 1927.

Ray C. Simmons, Petitioner,	} On Writ of Certiorari to the United States Circuit Court of Appeals for the First Cir- cuit
vs.	
Edward P. Swan.	

[November 21, 1927.]

Mr. Justice HOLMES delivered the opinion of the Court.

This is an action brought by the petitioner for breach of a contract. At the trial the judge directed a verdict for the defendant and the judgment was affirmed by the Circuit Court of Appeals. 11 F. (2d) 267. A writ of certiorari was granted by this Court. 273 U. S. 675.

By the contract the defendant agreed to sell to the petitioner, the plaintiff, a pickle factory, its specified equipment, and the good will of the business. For this the plaintiff agreed to pay fifteen thousand dollars, as follows: five hundred dollars on the signing of the agreement, 'check for which is hereby acknowledged'; twenty five hundred dollars to be paid on or before October 1, 1923; twelve thousand dollars by the plaintiff's note to the defendant's order, carrying interest at six per cent and payable on demand, to be secured by mortgage on the property conveyed. The defendant was also to convey the pickles then in tanks on the premises for which the plaintiff was to pay the sum of four dollars per thousand by a note signed by himself, F. C. Gould and Thomas J. Molumphy as joint makers. The time for performance was on or before October 1, 1923, and the place the office of Davenport and Fairhurst, Greenfield, Massachusetts. Time was declared to be of the essence of the contract and in case of the plaintiff's failure to perform any of his agreements, the five hundred dollars paid at the time of signing was to be retained as liquidated damages. The declaration alleged that the plaintiff was ready willing and able to perform his part. If in view of the facts any matter of waiver or

excuse should have been pleaded, no question of pleading was raised and none is open here.

A short statement of the dominant facts as they might have been found seems to us sufficient to show that the plaintiff had a right to go to the jury. The plaintiff and his party went to the appointed place on the appointed day, but the defendant was not there and his whereabouts were not to be ascertained, until about two o'clock when he telephoned that he was on his way to Greenfield and probably should be there by three. He arrived somewhere about five or later. After some discussions necessary to finish the business, at from six to seven the papers were signed and ready. The plaintiff then offered to the defendant for the twenty-five hundred dollars that he was to pay, a certificate of deposit from the Produce National Bank of South Deerfield—a bank near by and of unquestioned solvency. The defendant thereupon asked his lawyer if he had got to take it; the lawyer intimated that he was not bound to, and the defendant said 'Well, if I haven't got to take it I am not going to take it, and I will simply say good night, gentlemen'. took his hat and coat and walked out. Of course at that hour the banks were closed and the plaintiff could not get legal tender before the next day. In consequence of a frost the price of pickles had risen greatly, and the judge at the trial said that it was perfectly obvious that the defendant was trying to get out from under his contract. It will be noted that the contract contemplated that the first payment should be by check, and on September 22 the defendant had sent to the plaintiff a letter addressed to the Silver Lane Pickle Company, assumed to be interested, asking for a 'check in full for the pickle stock' for which by the agreement he was to receive a note, the amount as it turned out, being nearly fifteen thousand dollars. In such circumstances and in view of the way in which business is done at the present day, it might be found to have been natural and reasonable to suppose that a certificate of deposit from a well known solvent bank in the neighborhood would be enough. It seems likely that it would have been except for the defendant's desire to escape from his contract. If without previous notice he insisted upon currency that was strictly legal tender instead of what usually passes as money, we think that at least the plaintiff was entitled to a reasonable opportunity to get legal tender notes, and as it was too late to get them that day

might have tendered them on the next. But the jury might find also that the defendant's behavior signified a refusal to go farther with the matter and therefore that the plaintiff was not called upon to do anything more. If these were found to be facts, as they might be, the defendant broke his contract and the plaintiff has a right to recover. We have not mentioned some qualifying details insisted upon by the defendant because we have to consider only what the jury might find. The qualifications do not impress us but there are some important contradictions. The defendant will have an opportunity to present them if the case is tried again. See *Servel v. Jamieson*, 255 Fed. Rep. 892.

Judgment reversed.

A true copy.

Test :

Clerk, Supreme Court, U. S.

END